IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 18.03.2020

Pronounced on : 29.07.2020

CORAM

THE HONOURABLE Mrs. JUSTICE PUSHPA SATHYANARAYANA

THE HONOURABLE Dr. JUSTICE ANITA SUMANTH

AND

THE HONOURABLE Ms. JUSTICE P.T.ASHA

W.P.Nos.34236 of 2019, 1370, 1371, 1382, 1387, 1389, 1704, 2422, 2491, 2764, 3342, 3344, 3348, 3741, 3743, 3745 and 5165 of 2020, and W.M.P.Nos.1638 of 2020, 3796 of 2017,34866 and 34868 of 2019, 1617 to 1620, 1625, 1627, 1632, 1633, 1637, 1971, 1973, 2824, 2889, 2891, 3219, 3220, 3873, 3877, 3883, 4420, 4424, 4426, 6100, 6954, 6955, 6962, 6963, 7221 and 7223 of 2020 and Contempt Petition No.1960 of 2019, and Sub Application Nos.535 of 2019 and 158 of 2020

W.P.No.34236 of 2019 :

All India Private Educational Institutions Association
rep. by its State General Secretary K.Palaniyappan,
No.5, M.P.Avenue,
Majestic Colony, Saligramam,
Chennai-600 093. .. Petitioner

Vs.

1. The State of Tamil Nadu
Rep. by Principal Secretary to Government,
Labour and Employment Department,
Fort St. George,
Chennai-600 009.

2. The Employees State Insurance
Regional Corporation

Rep. by its Regional Director,
No.143, Sterling Road, Nungambakkam,
Chennai-600 034. .. Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India praying for a Writ of Declaration declaring that the G.O.Ms.No.237, Labour and Employment (K1) Department, dated 26.11.2010 published at page 879 of Part II Section 2 of the Tamil Nadu Government Gazette No.51, dated 29.12.2010 issued by the first respondent as illegal and unconstitutional insofar as the members of the petitioner association is concerned.

* * *

For Petitioner in W.P. : No.34236 of 2019, etc.	Mr.K.M.Vijayan, Senior Counsel for Mr.E.Vijay Anand
For Petitioner in W.P. : No.2422/2020, etc.	Fr.Xavier Arulraj, Senior Counsel for Sister Arul Mary for M/s.Fr.Xavier Associates
For Petitioners in W.P. : Nos.4905 & 4913/2020	Mr.Shakespeare
For Contempt Petitioner: in Cont.P.No.1960/2019	Mr.Singaravelan, Senior Counsel for Mr.R.Jayaprakash
For Respondents in : all these writ petitions & Contemnor	Mr.Vijay Narayan, Advocate General assisted by Ms.A.Srijayanthi, Special Government Pleader & Mr.Vignesh, Govt. Advocate for Tamil Nadu Government Mr.S.Ravindran, Senior Counsel for Mr.G.Bharadwaj and Ms.G.Narmadha for ESIC
For Intervener :	Mr.Balan Haridoss

C O M M O N O R D E R

PUSHPA SATHYANARAYANA, J.

ANITA SUMANTH, J.

AND

P.T.ASHA, J.

The genesis for the constitution of this Full Bench is the conflict of views arising from the interpretation of a Notification under which the provisions of the Employees State Insurance Act,1948 was extended to cover educational institutions.

2. A notification dated 26.11.2010, comprising of G.O.Ms.No.237, Labour and Employment (K1) Department (G.O.), was issued by the Government of Tamilnadu, which extended the Employees' State Insurance Act, 1948, (in short, "ESI Act") to educational institutions, but excluding the Government and Government aided educational institutions. The said G.O. was challenged in a batch of writ petitions and was decided by a learned Single Judge in **Maharaja College of Arts and Science and Others Vs. State of Tamil Nadu rep. by its Principal Secretary to Government and Others, 2011 Writ L.R. 332**, dismissing those writ petitions upholding the G.O. The said judgement was put to challenge

once again in batches of Writ Appeals, which were taken up by different Division Benches.

3. On 09.06.2015, a Division Bench of this Court disposed of a batch of writ appeals and petitions in ***Maharaja College of Arts and Science, rep. by its Chairman v. The State of Tamil Nadu*** [W.A.No.1233 of 2011] observing as below:

> *"Learned counsel for the parties state that as recorded in the order dated 05.05.2005 reported in **2005(5) SCC 1 (State of U.P. vs. Jai Bir Singh)**, the question of law has been referred to the Larger Bench of the Honourable Supreme Court, i.e. whether the Employees' State Insurance Act, 1948, would apply to educational institutions. Interim orders have been operating in the present matter.*
>
> *2. In view of the aforesaid position, the writ appeals and the writ petitions are disposed of **by agreement** that the interim orders would continue till the disposal of the matter by the Honourable Supreme Court and the parties would naturally remain bound by the legal position enunciated by the Honourable Supreme Court on such decision being rendered. No costs. Consequently, connected miscellaneous petitions are closed."*
>
> (emphasis ours)

4. Similarly, on 16.06.2015, another co-ordinate Division Bench in the case of ***Tamil Nadu Nursery Primary Matriculation and Higher Secondary Schools Managements Association, rep. By its General Secretary, D.Christdass v. The State of Tamil Nadu, rep. By its***

Principal Secretary to Government, Labour and Employment Department, Fort St. George, Chennai – 600 009 **and others**, passed a similar order.

5. In addition to the two writ petitions giving rise to the aforesaid orders dated 09.06.2015 and 16.06.2015 several other educational institutions had also moved this Court by way of writ petitions, that had been dealt with by different benches, both single and Division Benches at different times. In a few cases, not satisfied with the orders passed by this Court, certain aggrieved institutions went before the Hon'ble Supreme court and invited order of dismissal at the SLP stage itself.

6. To appreciate the reference order properly, the said orders and appellate orders, if any, are tabulated below:

Table I

Sl. No.	Case No.	Order/ Judgment dated	Parties / Citation	Remarks
1	W.P.No.23109 of 2017	29.08.2017	Pioneer College of Arts and Science V. State of Tamil Nadu	The very same impugned notification was questioned ; writ petition was dismissed.
2	W.A.No.1308 of 2017	26.10.2017	Pioneer College of Arts and Science V. State of Tamil Nadu, **2018 LLR 382**	Writ Appeal was disposed of, only giving time to the appellant institution to pay the ESI contribution arrears in installments.

Table II

Sl. No.	Case No.	Order/ Judgment dated	Parties / Citation	Remarks
1	W.P.No.22948of 2007	06.09.2017	GRG Matriculation Higher Secondary School V. State of Tamil Nadu	The very same impugned notification was questioned ; writ petition was dismissed, placing reliance on the order dated 15.03.2016 passed in S.L.P. No. 28285 of 2009 etc.,
2	SLP(C).No. 4668 of 2018	09.02.2018	GRG Matriculation Higher Secondary School V. State of Tamil Nadu	SLP was dismissed
3	Review Petition (C) No.1610 of 2018 in SLP (C) Noo.4668/2018	10.07.2018	GRG Matriculation Higher Secondary School V. State of Tamil Nadu	Review Petition was dismissed.

Table III

Sl. No.	Case No.	Order/ Judgment dated	Parties / Citation	Remarks
1	W.P.No.34339 2017	05.01.2018	Saraswathi Ramachandra Matric. Hr. Sec. School V. State of Tamil Nadu	The very same impugned notification and consequential order were questioned ; writ petition was dismissed.
2	WA No.523 of 2018	18.04.2018	Saraswathi Ramachandra Matric. Hr. Sec. School V. State of Tamil Nadu	Writ Appeal was disposed of, only giving time to the appellant institution to pay the ESI constribution arrears in installments.
3	SLP(C)No. 26697 of 2018	22.10.2018	Saraswathi Ramachandra Matric. Hr. Sec. School V. State of Tamil Nadu	SLP was Dismissed.

7. Besides the above, in the following cases, the orders of the Division Benches attained finality, as they were not challenged further:

Table IV

Sl. No.	Case No.	Order/ Judgment dated	Parties / Citation	Remarks
1	W.P.No.41028 of 2017	29.08.2017	Sri Ragavendra Polytechnic College V. ESI	The orders of the ESI corporation was questioned ; writ petition was dismissed.
2	W.A.No.1691 of 2017	19.01.2018	Sri Ragavendra Polytechnic College V. ESI	Writ Appeal was disposed of.

Table V

Sl. No.	Case No.	Order/ Judgment dated	Parties / Citation	Remarks
1	W.P.No.9069 of 2017	28.08.2017	Panimalar Polytechnic College V. State of TN	The very same impugned notification was questioned ; writ petition was dismissed.
2	W.A.No.420 of 2018	20.06.2018	Panimalar Polytechnic College V. State of TN	Writ Appeal was dismissed.

8. Orders passed by the Hon'ble Single Judges dismissing writ petitions challenging the impugned notification are tabulated below:

Table VI

Sl. No.	WP No.	Order/ Judgment dated	Parties / Citation
1	3317 of 2019	19.02.2019	Rose Garden Matric Hr.Sec. School V. Director, ESIC
2	5874 of 2018	10.04.2019	RKV CBSE Sec. School V. Director, ESIC
3	28913 of 2019	22.10.2019	Sri Guru Vidhyalaya Nursery and Primary School v. Govt. of Tamil Nadu

The orders extracted above would clearly demonstrate that a totally divergent view to that of the orders of the Division Bench dated 09.06.2015 and 16.06.2015 has been taken by co-ordinate Benches as well as by the Single Judges. Apart from the writ petitions detailed above there were some more writ petitions pending decision.

9. It is also relevant to note that a Division Bench of Kerala High Court in **CBSE School Management's Association Vs. State of Kerala, 2010-II-LLJ 240,** held a similar notification to be valid, which was followed in **Maharaja College case (cited supra)**. The Hon'ble Supreme Court dismissed the SLP preferred against the above said Kerala High Court judgement thereby upholding the notification.

10. Now, when a few of the writ petitions filed by different educational institutions (both colleges and schools) were grouped together and taken up by the Hon'ble First Bench for hearing, the counsels representing the private educational institutions have agreed that since the two Division Benches of co-ordinate strength had ordered that the matter shall await the decision of the Hon'ble Supreme Court to be decided by a Larger Bench, as decided in **State of U.P. Vs. Jai Bir Singh, 2005 (5) SCC 1,** propriety and consistency warrants that the same order may be passed. It was also pointed out that there was an apparent conflict of opinion between the Division Bench Orders and that it

requires consideration by a Larger Bench. Further, the orders of the Division bench dated 09.06.2015 and 16.06.2015 were passed on the premise that the question of law that has been referred to the Larger Bench of the Supreme Court was whether the ESI Act would apply to educational institutions.

11. After hearing all the counsels and elaborate discussion, the First Division Bench, vide order dated 02.03.2020, had referred these writ petitions to be decided by a Full Bench formulating the following questions of reference:

i. Whether the final disposal of the two writ appeals vide orders dated 09.06.2015 and 16.06.2015 are based on a correct construction and reading of the ratio of the referring order in the case of ***State of U.P. v. Jai Bir Singh, (2005) 5 SCC 1,*** paragraphs 38, 41, 42 and 44 in particular?

ii. If the answer to the first question is in the positive, then too does propriety demand awaiting a decision in the reference keeping in view the fact that the orders dated 09.06.2015 and 16.06.2015 are only interim orders that do not attach a finality by an adjudication on the issue?

iii. Whether unaided private educational institutions can be treated to be an establishment within the meaning of Section 1(5) of the Employees State Insurance Act, 1948 and be capable of being governed by notifications issued under the 1948 Act as being an establishment being covered within the word "*otherwise*" ?

iv. Whether the State has discriminated between private unaided educational institutions on the one hand and the public and government aided private educational institutions on the other by issuing a notification applying the same only to the former, which may amount to an act of invidious discrimination under

Article 14 of the Constitution of India so as to enable the petitioners to resist the impugned notification dated 26.11.2010?

v. Whether the State or Central Government can notify the applicability of the 1948 Act only after an amendment either under the 1948 Act or the State Acts, keeping in view that the word "*insurance*" occurring in Section 19 of the 1973 Act and a *pari materia* provision under the 1976 Act already covers insurance coverage of the teachers and other employees of schools and colleges?

vi. Whether the notification dated 26.11.2010 can be enforced even without an amendment in the provisions as referred to in Question (v)?

The answers to the first two questions in the negative would only necessitate the answers to the other questions framed by us."

12. As per the orders of the Hon'ble The Chief Justice of even date, this Full Bench was assigned with the said task.

13. Initially, before issuing the impugned notification dated 26.11.2010, the Labour and Employment Department, Government of Tamil Nadu, with an intent to include the educational institutions, excluding the Government and Government Aided educational institutions, which employ 20 or more persons within the purview of the ESI Act, issued a preliminary notification dated 11.05.2005 and the same reads as follows :

Extension of Employees' State Insurance Scheme to certain New Sectors of Establishments in all the Implemented area under Employees'

State Insurance Act. (G.O.No.58, Labour and Employment (K1), 15.04.2005)

No.II(2)/LE/366/2005 - In exercise of the powers conferred by sub-section (5) of Section 1 of the Employees' State Insurance Act, 1948 (Central Act XXXIV of 1948), the Governor of Tamil Nadu in consultation with the Employees State Insurance Corporation and with the approval of the Central Government hereby gives notice of its intention to extend the provisions of the said Act to the class of establishments specified in column (1) of the Schedule below situated in the areas specified in the corresponding entries in column (2) thereof, on or after six months from the date of publication of this Notification in the Tamil Nadu Government Gazette.

THE SCHEDULE

Description of class of establishments (1)	Areas in which the establishments are situated (2)
Educational Institutions (excluding Government and Government Aided Institutions), run by individuals, trustees, societies or other organisations, wherein 20 or more persons are employed or were employed on any day of the preceding twelve months.	Areas where the Scheme has already been brought into force under sub-section (3) of Section 1 and sub-section (5) of Section 1 of the Act.

14. Admittedly, the private educational institutions, including the petitioners before us, have not filed any objections to the said notification and consequently, after the expiry of the statutory period of six months, and only on 26.11.2010, the impugned notification in G.O.Ms.No.237, extending the ESI Act to all private unaided educational institutions came

to be issued by virtue of Section 1(5) of the ESI Act. Before extracting the said notification, it is apt to reproduce Section 1(5) of the ESI Act, which reads as follows:

> *"Section 1 - ....*
>
> *(5) The appropriate Government may, in consultation with the Corporation and where the appropriate Government is a State Government, with the approval of the Central Government, after giving one month's notice of its intention of so doing by notification in the Official Gazette, extend the provisions of this Act or any of them, to any other establishment, or class of establishments, industrial, commercial, agricultural or otherwise.*
>
> *Provided that where the provisions of this Act have been brought into force in any part of a State, the said provisions shall stand extended to any such establishment or class of establishments within that part if the provisions have already been extended to similar establishment or class of establishments in another part of that State."*

15. The impugned notification dated 26.11.2010 is usefully reproduced hereunder:

> "Extension of Employees' State Insurance Scheme to certain New Sectors of Establishments in all the Implemented area under Employees' State Insurance Act. (G.O.Ms.No.237, Labour and Employment (K1) Department, 26.11.2010)
>
> **No.II(2)/LE/767/2010** - In exercise of the powers conferred by sub-section (5) of Section 1 of the Employees' State Insurance Act, 1948 (Central Act XXXIV of 1948), the Governor of Tamil Nadu, in consultation with the Employees State Insurance Corporation and with the

approval of the Central Government, after complying with the statutory requirement of giving six months notice of the intention of the Tamil Nadu Government vide Labour and Employment Department Notification No.II(2)LE/265/2008, published at page 206 of Part-II, Section 2 of the Tamil Nadu Government Gazette, dated 04.06.2008, hereby extends the provisions of the said Act, to the educational Institutions (excluding Government and Government aided institutions) run by individuals, trustees, societies or other organizations, wherein, twenty or more persons are employed or were employed on any day of preceding twelve months, with effect from the date of publication of this Notification."

16. Aggrieved by the said notification, several writ petitions were filed by the bodies representing the private schools and self-financing colleges. As stated above, the said writ petitions were dismissed by the learned Single Judge in **Maharaja College of Arts and Science case (supra).**

17. The two exceptions taken by the learned Single Judge was that (i) the challenge to the extension of the ESI Act to private educational institutions in Tamil Nadu cannot be done at the instance of association of private schools and self-financing colleges, as only the aggrieved institutions can challenge the same ; and (ii) the ESI Act coverage is for the benefit of employees, who also contribute towards subscription and that any decision that may be taken in their absence will not bind them and would seriously prejudice their rights. The Hon'ble Single Judge had placed reliance on the judgment of the Hon'ble Supreme Court in **2009**

(9) SCC 485 (Fertilizers and Chemicals Travancore Pvt. Ltd. V. ESI Corporation) and also in **2009 (10) SCC 671 (ESI Corporation V. Bhakra Beas Management Board.**

18. As indicated at the outset, assailing the order of the learned Single Judge in **Maharaja College of Arts and Science case (cited supra),** a batch of writ appeals were filed, which were heard along with a batch of writ petitions filed subsequent to the common judgment passed by the learned Single Judge, and the two separate judgments dated 09.06.2015 and 16.06.2015 referred to hereinabove came to be passed.

19. Mr.K.M.Vijayan, learned Senior Counsel argued that the disposal of the Writ Appeals by the Division Bench on 09.06.2015 and 16.06.2015 based on the judgment in **Jai Bir Singh case (cited supra)** is, perfectly correct, as the outcome of the Larger Bench decision will, certainly, have an impact on the case on hand. The learned Senior Counsel would further argue that since the ESI Act and the ID Act are inseperable the reference to the larger Bench in State of UP vs Jai Bir Singh assumes signification. The judgement in Bangalore Water Supply Board which has now been referred to the Larger Bench had given a wide interpretation to the definition "industry" by including "educational institutions" also within its

ambit. He would, therefore, submit that propriety demands that this court awaits the decision of the Larger Bench of the Hon'ble Supreme Court so as to avoid multiplicity of judgments.

20. Another argument advanced by the Learned Senior Counsel was that the Amended ID Act has to treated as 'law in force' in the light of Art.13(3) (b) and Art.372(3) Explanation 1 and "existing law" as per Art.366(10) of the Constitution of India. Therefore since the Amended ID Act has excluded educational institutions from the purview of the definition of industry it is but prudent to await the judgment of the larger Bench of the Hon'ble Supreme Court. Reliance was placed on the following judgments:

(i) **Administrator, Ranchi Municipal Corporation V. Kamakhya Narain Singh and Others, 1982 (3) SCC 387** ;

(ii) **Punjab Vidhan Sabha V. Prakash Singh Badal, 1987 (Supp) SCC 610** ; and

(iii)Commissioner of Service Tax V. Sri Selvaganapathy, 2018 (4) SCC 578.

21. It is specifically pointed out by Mr.K.M.Vijayan, learned Senior Counsel that the word 'establishment' is not defined under the ESI Act.

The word 'establishment', as referred to in Section 1(5) has to be read as industrial, commercial, agricultural or otherwise an establishment. The ESI Act, wherever had not defined any word or expression, then reference may be had to the Industrial Disputes Act, 1947 (in short, "the ID Act"). Therefore, it was contended that both ESI Act and the ID Act failed to define the word 'establishment' separately, however, the word 'industrial establishment' is defined under the ID Act in section 2(ka), which reads as follows :

> *"(ka) "industrial establishment or undertaking" means an establishment or undertaking in which any industry is carried on:*
>
> *Provided that where several activities are carried on in an establishment or undertaking and only one or some of such activities is or are an industry or industries, then,--*
>
> *(a) if any unit of such establishment or undertaking carrying on any activity, being an industry, is severable from the other unit or units of such establishment or undertaking, such unit shall be deemed to be a separate industrial establishment or undertaking;*
>
> *(b) if the predominant activity or each of the predominant activities carried on in such establishment or undertaking or any unit thereof is an industry and the other activity or each of the other activities carried on in such establishment or undertaking or unit thereof is not severable from and is, for the purpose of carrying on, or aiding the carrying on of, such predominant activity or activities, the entire establishment or undertaking or, as the case may be, unit thereof shall be deemed to be an industrial establishment or undertaking."*

He would, therefore, contend that the answer to reference No.i should be in the affirmative and consequently, the answer to reference No.ii would follow suit and propriety would demand that all the writ petitions should await the judgment of the Larger Bench of the Hon'ble Supreme Court.

22. Since the others arguing against the notification have, by and large, adopted the arguments of Mr. K.M.Vijayan, Senior Counsel we are only extracting the additional arguments made by them. Fr.Xavier Arulraj, Senior Counsel would make the following submissions:

i Teachers are not workmen as defined in Section 2(s) of the ID Act as held in **A.Sundarambal V. Government of Goa, Daman and Diu, 1988 (4) SCC 42.** He would place reliance on para 10 of the said judgement and contend that in arriving at the above conclusion the Hon'ble Supreme Court has taken into consideration the functions of a teacher which is more in the nature of a mission or a noble Vocation.

i Reliance was also placed upon the judgment reported in **1996 (4) SCC pg 225 ---Harayana Unrecognised Schools Association vs the State of Harayana,** where, the Hon'ble Supreme Court held that teachers of educational institutions cannot be held to be employees under Sec.2(i) of the Minimum wages Act.

i In yet another judgement arising under the Bihar Shops and Establishments Act, 1953 reported in **2001 (2) SCC 115, Ruth Soren V. Managing Committee, East I.S.S.D.A. and others.** the Hon'ble Supreme Court held that Establishment as defined in the above Act will not encompass educational institutions.

iv. In the light of Section 19 of the Tamil Nadu Recognised Private Schools Act, 1973 (hereinafter referred to as "the Private Schools Act") occupying the field, the State cannot extend the ESI Act to the educational institutions.

23. Mr.Singaravelan, learned Senior Counsel for the Contempt Petitioner, besides adopting the arguments of the other learned Senior Counsels, also contended that the way in which, the authorities proceeded with the issue shows their deliberate conduct of scant regard to the orders of this Court and they are liable to be punished.

24. Mr.Shakespeare, learned counsel for the petitioner would argue on repugnancy. He would contend that when the Tamilnadu Recognised Private Schools (Regulation) Act enacted by the State of Tamilnadu having received the assent of the President of India, the impugned notification was intruding into the occupied field and therefore, in the light of Article 254 (2) of the Constitution of India, it is only the provisions of the Tamil Nadu Recognized Private Schools Act that would prevail.

25. The Learned Advocate General, arguing in favour of the notification and urging this Court to answer reference Nos.i and ii in the affirmative, made his submissions under the following heads:

(a) He would contend that the pendency of the matter before the larger bench does not preclude the court from considering the matter on merits. He would draw the attention of the court to the judgement in **2013 (16) SCC 16, State of Maharashtra Vs Sarva Sharmi K Sangh**, wherein, one of the contentions raised by the appellant was that the reconsideration of the wide interpretation of the concept of "industry" in **Bangalore Water Supply and Sewarage Board** is pending before a larger Bench of the Hon'ble Supreme Court. The Learned Judges went ahead hearing the appeal and observed that the determination of the present dispute cannot be kept undecided until the judgement of the larger Bench is received.

(b) Extensive arguments were made on the question of repugnancy of the notification in the light of Sections 19 and 28 of the Private Schools Act. The Learned Advocate General would submit that there is no inconsistency or conflict between the two. He would contend that the object of the Private Schools Act was to provide for the regulation of recognised private schools in the State of Tamilnadu, whereas, the ESI Act is a social security legislation which provides for certain benefits to employees in case of sickness, maternity and employment injury and to make provisions for certain other matters in relation thereto. He would, therefore, submit that the two legislations are not in conflict with one and other. He has relied on

certain judgements in support of the said contention, which are dealt with in the later part of this order.

(c) He would further contend that the ESI Act is an important Social Welfare Legislation aimed at providing certain benefits to employees of a factory or such establishment or class of establishments that the appropriate Government in consultation with the Corporation extends.

26. While sailing with the arguments of the learned Advocate General, Mr.Ravindran, learned Senior Counsel for the ESI Corporation, made elaborate submissions, with supportive documents, qua the medical and monetary benefits extended by the ESI Corporation to the workmen and their families during the time of crisis. Alleging that the apprehension of the private educational institutions is misconceived, the learned Senior Counsel sought for sustaining the impugned notification and answering the reference accordingly.

27. Ironically, the notification has been challenged only by the Employers and the lone voice of the Employee was through Mr.Balan Haridas, who appeared and supported the notification.

28. At this juncture, it is pertinent to refer to the coverage of the ESI Act qua private educational institutions by various States in the country, the challenge to the same and relevant case-law in this regard.

29. A Division Bench of the **Kerala High Court** in **CBSE School Management's Association (cited supra),** dealt with Section 1(5) of the ESI Act and held as follows:

> *"17. We hold that the notification under Section 1(5) of the ESI Act can cover an educational institution for two reasons:- Our first reason is that, the educational institutions like schools are industrial establishments, in view of the decision of the Apex Court in Bangalore Water Supply and Sewerage Board's case, (supra). Though a few Benches of lesser strength have expressed the necessity for reconsidering the dictum in Bangalore Water Supply and Sewerage Board's case, (supra), until such a reconsideration is done by a larger Bench, we are absolutely bound by the decision of the Apex Court in Bangalore Water Supply and Sewerage Board's case, (supra). If that be so, the only possible view that could be taken in the face of the words contained in Section 1(5) of the ESI Act is that educational institutions are also covered by the expression 'industrial establishment'. The main thrust of the argument of the writ petitioners was that educational institution is not an industry. In view of the binding precedent mentioned above, we cannot accept that contention. Further, the interpretation of the definition of "industry" in Section 2(j) of the Industrial Disputes Act is applicable to the interpretation of the word "industrial" in Section 1(5) of the E.S.I. Act, in view of Section 2(24) of the latter Act which reads as follows:*
>
> *"2. Definitions:-*
>
> *xxx xxx xxx*

(24) all other words and expressions used but not defined in this Act and defined in the Industrial Disputes Act, 1947 (14 of 1947), shall have the meanings respectively assigned to them in that Act.".

30. As stated above, the Special Leave Petitions (SLPs) were filed against the said order before the Hon'ble Supreme Court, which were heard along with other SLPs filed between 2009 and 2016, and the Hon'ble Apex Court by the order dated 15.03.2016 rejected all those SLPs in **Kerala Unaided School Managements Association V. State of Kerala** observing that "we do not find any legal and valid ground for interference. The Special Leave Petitions are dismissed".

31. A similar Notification dated 13.05.2011 issued by the **Government of Karnataka** under Section 1(5) of the ESI Act was put to challenge before the Karnataka High Court by the private schools. While dismissing the writ petitions upholding the notification, in the decision reported in **ILR 2012 Kar 2664, Managements of Independent CBSE Schools Association, Karnataka and Others V. Union of India,** the **Karnataka High Court** held as follows :

"42. The last word 'otherwise' used in Section 1(5) of the ESI Act has wide amplitude. The legislature, in exercise of its wisdom, has empowered the Government to bring in not merely the industrial, commercial or agricultural establishments, but also other establishments including the educational establishments. When the

provisions of the ESI Act can be made applicable to educational establishments or the institutions, then the word 'employee' would accordingly apply to the employees working therein.

43. The word 'otherwise' used in Section 1(5) of the ESI Act cannot be given restrictive meaning by applying the principle ejusdem generis. The legislature has closed all the escape routes by consciously using the word 'otherwise'."

32. The **Uttar Pradesh Government** issued a similar notification on 22.08.2018, which was unsuccessfully questioned before the **Allahabad High Court** in **Maharishi Shiksha Sansthan V. State of Uttar Pradesh, 2009 (1) LLN 381,** wherein, it was held as follows :

"9. Learned counsel for the petitioner has argued that the word 'establishment' must have some relation with factory and educational institution is not even remotely connected with the activity, which is carried out in factories. This argument is not tenable for the reason that under Section 1(5), there is no such restriction.

10. Thereafter, learned counsel for the petitioner has argued that the afore said sub-section suffers from the vice of excessive delegation as the power to bring any establishment under the Act has been conferred upon the Government without providing any guidelines.

11. This argument is also not acceptable. The purpose of the Act is to confer certain benefits upon the employees and employees of any establishment may deserve such benefits. This question has also been considered in the Supreme Court authority reported in (1987) 2 SCC 101, Hindu Jea Band, Jaipur v. Regional Director, Employees' State Insurance Corporation, Jaipur....."

33. While dismissing the appeal preferred against the said order, a Division bench of the **Allahabad High Court** in the judgment reported in **Maharishi Shiksha Sansthan V. State of Uttar Pradesh, 2009 (120) F.L.R. 332,** observed as follows :

> *"We are of the considered opinion that the Hon'ble Single Judge has rightly held that educational institution would be covered under the definition of establishment specifically in view of the use of the word 'otherwise'. It has rightly been held that the word 'otherwise' is of wide amplitude covering all other establishments including educational institutions."*

34. In the year 2009, the **Punjab Government** issued a similar notification on 02.06.2009, which was questioned in the **Punjab and Haryana High Court**. A learned Single Judge upheld the notification, which order was affirmed by a Division Bench in **Seth Nand Lal Bajaj Educational Charitable Society, Chandigarh V. State of Punjab and Another, 2014 SCC OnLine P & H 25089,** holding as hereunder:

> *"24. May be, originally, the provisions of the Act were applied to factories etc. but in the changing scenario, it has rightly been held that the provisions are applicable to educational institutions as well.*
>
> *25. To say that the educational institutions would fall under the definition of "establishment", the learned single Judge observed as under:*
>
> *"The counsel have made reference to a few of the precedents to highlight the meaning of word "establishment". Reference is made to the word "establishment" as given in Webster's Encyclopedic Unabridged Dictionary, where, inter alia,*

establishment is defined as "a place of business together with its employees, merchandise, equipment etc., a permanent civil, military, or other force or organization, an institution, as a school, hospital etc. The term "establishment" was also considered by the Division Bench of Kerala High Court in Thankamma Baby v. Employees Provident Fund Appellate Tribunal New Delhi, 2010 III LLJ 439. In this case, the court observed that it is the cardinal rule of interpretation that the court should always adopt a purposive interpretation, particularly in a welfare statute. A provision in a Statute has to be understood, interpreted and applied keeping in mind the object of Statute. If two interpretations are possible, the interpretation favouring the object of the statute has to be adopted. The Hon'ble Supreme Court in Transport Corporation of India v. Employees' State Insurance Corpn., (2000) 1 SCC 332 has also referred to the meaning of term "establishment". It is observed that the word is not defined under the Act, but the term "employee" as defined under the Act has a direct connection with the term "establishment" in which he or she may be employed for wages in or in connection with the work of the establishment. There would not be much need to make reference to the case law like in the case of Cochin Shipping Co. v. Employees State Insurance Corporation, (1992) 4 SCC 245, where the provisions of ESI Act were noticed to claim benefits to the employees in the case of sickness, maternity and employment injury. It was also observed that at the first instance, it was made applicable to all factories under Section 1(4) of the ESI Act. The Act had envisaged the extension of benefit to the employees of other establishments or class of establishments and such establishments may be industrial, commercial or agricultural or otherwise. It can, thus, be observed that the benefit conferred by the Act covered a large area of employees than what the Factories Act and me akin legislations intended therein. Accordingly, endeavour has to be to place a liberal construction so as to promote the object of the Act. Again in Whirlpool of India Ltd. v. E.S.I. Corporation, (2000) 3 scc 185, it is held that the Act is a social legislation enacted to provide

benefits to employees in case of sickness, maternity and employment injury. Accordingly, it is observed that the words and expressions used but not defined are to be given a meaning which would advance the purpose of the Act. If any provision of which two interpretations may be possible, it would deserve such construction as would be beneficial to the working class and the courts would give a go-by to the plain language of the provision.

The submission made by some of the counsel that the provisions can not be applied to unaided institutions is being noticed to be rejected. The Schedule attached clearly mentions "Education Institutions" without specifying the institution but has inclusively referred to private, public, aided or partly aided in all compassing term "Educational Institution". There is no substance in the submission made."

26. We feel that view taken by the learned single Judge is perfectly justified and needs no interference. The provisions of the Act have rightly been interpreted to say that these can be made applicable to the privately run educational institutions (aided or partially aided).

27. Otherwise also, ***there is nothing on record to show that the financial condition of the appellant is such that it will not be in a position to bear very small financial burden to provide medical and insurance facilities to its employees. Nothing has been brought on record to say that if the scheme is implemented qua the appellant institution, it would not be in a position to run educational activities. No case is made out for interference in the order under challenge****."*

(emphasis supplied)

35. The **Gauhati High Court** also upheld a similar notification issued by the Government of Assam on 06.01.2009 in **All Assam English**

Medium Schools Association and Another v. The State of Assam & Others, 2016 SCC OnLine Gau 662 and held as follows:

> *"16. While the Industrial Disputes Act operates in the field of industrial relation, the ESI Act is intended to protect the working class from uncertain contingencies in course of their employment. Of course the two Acts may apply generally to all employees but in the field of operation, the two enactments do not overlap and have mutually exclusive operational area. Therefore the applicability of the ESI Act with reference to its coverage at first instance to the employees in the industrial sector, can't be a correct mode of interpretation as the two Acts are not parimateria with each other. Hence, the restrictive interpretation to confine coverage only to the three species, i.e., Industrial, Commercial and Agricultural establishment in my opinion, would defeat the intended objection of the Act. Consequently such arguments of the petitioners must fail as otherwise, the words "other establishment" and "otherwise" occurring in the enabling section would be made redundant and such could not have been the legislative intent, for enactment of the sub-section (5) of section 1 of the ESI Act.*
>
> *17. When we proceed on the above basis, the application of ESI Act to cover Educational institutions can't be faulted, although such institutions may not normally be bracketed in the category of Industrial, Commercial or Agricultural establishments. The word "otherwise" in sub-section (5) of section 1 provides ample scope to cover all variety of establishments beyond the three identified species in the Section. Moreover if we see the beneficial effect of the ESI Act, the court should strive to achieve the legislative objective and apply that interpretive exercise, which will extend the social security scheme under the ESI Act, to the vulnerable employees of the Educational institutions."*

36. Though similar notifications dated 28.08.2006 and 10.02.2011 issued by the **Government of West Bengal** were set aside by a learned Single Judge of the Calcutta High Court, a Division Bench of the **Calcultta High Court** while reversing the said decision in **the Principal Secretary, Department of Labour, Government of West Bengal V. Om Dayal Educational and Research Society and Others, 2019 SCC OnLine Cal 5174** held as follows:

> *"29. The impugned notifications extend the application of the said 1948 Act to, inter alia, educational institutions (including public, private, aided, or partially aided) run by individuals, trusts, societies or other organisations. Such organisations and institutions are by definition institutions either of a charitable nature or educational institutions, which are bound to be employing teachers and staff for imparting education. Hence, they are most certainly within the meaning of 'establishments' under Section 1(5) of the said 1948 Act. The respondent-writ petitioners, being a charitable and educational society that runs two schools, most certainly falls within the ambit of the said notification and, in extension, within the meaning of establishments under Section 1(5) of the said 1948 Act."*

37. The learned Senior Counsels and the learned counsels for the petitioners specifically pointed out that when the Division Benches of our Court had chosen to wait for the outcome of the Larger Bench reference, the other High Courts did not do so and pronounced judgements, as

discussed above. In other words, according to the petitioners, the ESI Act has to refer to the ID Act, which is an exclusive labour legislation.

38. It was contended further by Mr.Singaravelan, learned Senior Counsel that the reference to the Larger Bench made by the Hon'ble Supreme Court assumes significance in deciding the legality of the impugned notification. It was, strenuously, contended that the reference to Larger Bench indicates that the Hon'ble Apex Court already felt that the educational institutions should be kept outside the purview of the word 'industry' and the said intention is clear while reading paragraphs 38 to 46 of the judgment of the Apex Court in **Jai Bir Singh** (supra).

39. Further, learned Senior Counsel pointed out that the Industrial Disputes Act, 1947, was amended by an Amendment Act 46 of 1982, wherein, the legislature wanted to exclude certain fields, which have to be kept outside the purview of the definition of the word 'industry'. Accordingly, Educational, Scientific, Research and Training Institutions are not to be included within the definition of the word 'industry'. It is also worthy to note that the said amendment is yet to be notified and kept in dormant mode till today for the best reasons known.

40. In response, the Senior Counsel Mr.Ravindran, representing ESI Corporation argued that the subject matter in **Jai Bir Singh (supra)**, is with respect to the definition of 'industry', as it occurs in Section 2(j) of the ID Act and is unconnected with the application of the ESI Act to educational institutions, as interpreted by the Division Bench in writ appeal orders dated 09.06.2015 and 16.06.2015. The Division Bench had passed the order as follows:

> " in the order dated reported in 2005 (5) SCC 1, the question of law has been referred to the Larger Bench of the Hon'ble Supreme Court, i.e., whether the ESI Act, 1948, would apply to educational institutions "

41. There is a misconception that **Jai Bir Singh (supra)** pertains to the application of the ESI Act to educational institutions. The I.D. Act is an Act to make provision for the investigation and the settlement of industrial disputes and for certain other purpose. The ESI Act is a social security legislation that provides for certain benefits to employees in case of sickness, maternity and employment injury and to make provisions for certain other matters in relation thereto.

42. It was vehemently contended by the Senior Counsel that the term 'establishment' is not defined in the ID Act either. The ESI Act was enacted after the I.D. Act, 1947. Therefore, if the intention of the Legislature was to restrict the application of the ESI Act only to industrial

establishments, Section 1(5) would have indicated the same, instead, conscious of the fact that the ID Act was in existence, had deliberately omitted to add any qualitative word preceding the term 'establishment'. Instead, illustratively, a few examples are given followed by the term 'or otherwise'. Therefore, Section 1(5) of the ESI Act was worded in such a way to be inclusive of infinite possibilities and not as an exhaustive list. Now the executive has been entrusted with the task of including all and any establishment under the ESI Act, as and when need arises. Besides, any entity/establishment, which undertakes an organised activity and employs persons, would be covered under the term 'establishment'.

43. As mentioned above, the object of the ID Act is to ensure a balanced bargaining power between the employer and workmen in situation of unrest, such as layoff, retrenchment, closure or strike, when there is a dispute between the employer and workmen. The ID Act regulates the mode of dealing with such disputes.

44. However, the object of ESI Act operates on a completely different field, i.e., to provide various benefits towards sickness, maternity and employment injury to employees not just in industries but in other establishments as well.

45. A reading of the Statement of Objects and Reasons appended to the ESI Act would go to show the purpose, for which it was enacted and the same reads as follows:

> *"The introduction of a scheme of Health Insurance for Industrial Workers has been under the consideration of the Government of India for a long time. The necessity for such a scheme has become more urgent in view of the conditions brought about by war. The scheme envisaged is one of compulsory State Insurance providing for certain benefits in the event of sickness, maternity and employment injury to workmen employed in or in connection with the work in factories other than seasonal factories.*
>
> *(2) A scheme of this nature has to be planned on an all-India basis and administered uniformly throughout the country. With this object, the administration of the scheme is proposed to be entrusted to a Corporation constituted by central legislation."*

46. The Hon'ble Supreme Court explained the scope of the term 'employee', as envisaged in Section 2(9) of the ESI Act in **Royal Talkies, Hyderabad and Others V. Employees State Insurance Corporation, 1978 (4) SCC 204,** and held as follows :

> *"20. Shri Chitale tried to convince us that on a minute dissection of the various clauses of the provision it was possible to exclude canteen employees and cycle stand attendants. Maybe, punctilious sense of grammar and minute precision of language may sometimes lend unwitting support to narrow interpretation. But language is handmaid, not mistress. Maxwell and Fowler move along different streets, sometimes. When, as in Section 2(9), the definition has been cast deliberately in the widest terms and the draftsman has endeavoured to*

cover every possibility so as not to exclude even distant categories of men employed either in the primary work or cognate activities, it will defeat the object of the statute to truncate its semantic sweep and throw out of its ambit those who obviously are within the benign contemplation of the Act. Salvationary effort, when the welfare of the weaker sections of society is the statutory object and is faced with stultifying effect, is permissible judicial exercise."

47. A Division Bench of this Court in **ESI Corporation v. S.Savitri and Others, 2003 (3) LLJ 250,** explained the scope of the ESI Act in the following manner:

"12. ..... Further, the Scheme of the Act, Rules and the Regulations spelled out that the insurance covered under the Act is distinct and differ from the contract of insurance in general. Under the Act, the contributions go into a fund under Section 26 for disbursal benefits, in case of accident, displacement, sickness, maternity etc., the contribution required to be made is not paid back even if an employee does not avail any benefit. It is also relevant to note that the Employees State Insurance Act, 1948 is a piece of social welfare legislation enacted primarily with the object of providing certain benefits to employees in a case of sickness, maternity and employment injury and also to make provisions for certain other matters incidental thereto. The Act in fact tries to attain the goal of socio-economic justice enshrined in the Directive Principles of State Policy under Part IV of the Constitution, in particular articles, 41, 42 and 43 which enjoin the State to make effective provision for securing the right to work, to education and public assistance in case of unemployment, old age, sickness and disablement, and in other cases of any under served want to make provision for securing just and human conditions of work, and maternity relief and to secure by suitable legislation or economic organisation or in any other way, to all workers, work, a living wage, decent standard of life and full enjoyment of leizure and social and cultural activities. This Act covers a wider spectrum than the Factories Act. Extensive Regulations have been

framed under the Act to identify the employees who would be entitled to the benefits. An elaborate machinery is provided for the effective administration of the Act, the Apex body being the ESI Corporation, subordinate to which are the Standing Committee and Medical Benefit Council. The Corporation is a public corporation controlled and subsidised by the Government for the benefit of the employees, its object being rendering service to a weaker section of the public."

48. It is relevant to state that besides the Madras High Court many of the High Courts upheld the provisions of the ESI Act relying upon Part IV of the Constitution keeping in mind that the said Act is a pre-Constitutional enactment. After coming into effect of the Constitution, the objects of the said Act were applied to fulfil the Directive Principles of the State Policy enshrined under Part IV of the Constitution.

49. In the light of the above background, we proceed to answer the issues referred to us by the Division Bench as follows:

Question Nos.I and II :

50. The questions of reference No.(i) and (ii), referred to us by the Division Bench are as follows :

"(i) Whether the final disposal of the two writ appeals vide orders dated 09.06.2015 and 16.06.2015 are based on a correct construction and reading of the ratio of the referring order in the case of ***State of U.P. v. Jai Bir Singh, (2005) 5 SCC 1,*** paragraphs 38, 41, 42 and 44 in particular?

(ii) If the answer to the first question is in the positive, then too does propriety demand awaiting a decision in the reference keeping in view the fact

that the orders dated 09.06.2015 and 16.06.2015 are only interim orders that do not attach a finality by an adjudication on the issue?

51. As the issue No.(i) and (ii) are intertwined, we propose to deal with them together. It is to be noted that what is envisaged in **Jai Bir Singh (supra)** is an requirement under the ID Act. Even assuming that an educational institution is not an industry, it would still be an establishment. The teaching and non-teaching staff of educational institutions are the beneficiaries, as per the impugned G.O.Ms.No.237. Do they come under the definition "employee" or "workmen"? While the ESI Act, the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (EPF Act) and the Payment of Gratuity Act, 1972 employ the word "employees", the ID Act and the Workmen's Compensation Act employ the word "workman". The ID Act and the Workmen's Compensation Act, 1923, are exclusive enactments for industrial establishments. The provisions of both are more or less in pari materia with each other and address workmen of industries. However the EPF, ESI and Payment of Gratuity Act apply to 'establishments', a term of wider import than 'industries'. The sweep of the aforesaid enactments is thus greater and they address all 'employees' and not only 'workmen'.

52. The interpretation of the term 'industry' as found in Section 2(j) of the ID Act was resolved by the Constitution Bench in **Bangalore Water Supply and Sewerage Board V. A.Rajappa, 1978 (2) SCC**

213. The opinion of Hon'ble Justice V.R.Krishna Iyer in that case became the unanimous opinion of the Seven-Judge bench. The following paragraphs from the said judgment make it clear that the term 'industry' should be defined to subserve the principle laid down in Part IV of the Constitution:

> *"18. ..... The mechanism of the Act is geared to conferment of regulated benefits to workmen and resolution, according to a sympathetic rule of law, of the conflicts, actual or potential, between management and workmen. Its goal is amelioration of the conditions of workers, tempered by a practical sense of peaceful co-existence, to the benefit of both — not a neutral position but restraints on laissez faire and concern for the welfare of the weaker lot. Empathy with the statute is necessary to understand not merely its spirit, but also its sense. One of the vital concepts on which the whole statute is built, is "industry" and when we approach the definition in Section 2(j), we must be informed by these values. This certainly does not mean that we should strain the language of the definition to import into it what we regard as desirable in an industrial legislation, for we are not legislating de novo but construing an existing Act. Crusading for a new type of legislation with dynamic ideas or humanist justice and industrial harmony cannot be under the umbrella of interpreting an old, imperfect enactment. Nevertheless, statutory diction speaks for today and tomorrow; words are semantic seeds to serve the future hour. Moreover, as earlier highlighted, it is legitimate to project the value-set of the Constitution, especially Part IV, in reading the meaning of even a pre-Constitution statute. The paramount law is paramount and Part IV sets out Directive Principles of State Policy which must guide the judiciary, like other instrumentality, in interpreting all legislation. Statutory construction is not a petrified process and the old bottle may, to the extent language and realism permit be filled with new wine. Of course, the bottle should not break or lose shape.*

* * *

21. ..... A pluralist society with a capitalist backbone, notwithstanding the innocuous adjective "socialist" added to the Republic by the Constitution (Forty-second Amendment Act, 1976) regards profit-making as a sacrosanct value. Elitist professionalism and industrialism is sensitive to the "worker" menace and inclines to exclude such sound and fury as "labour unrest" from its sanctified precincts by judicially de-industrialising the activities of professional men and interest groups to the extent feasible. Governments, in a mixed economy, share some of the habits of thought of the dominant class and doctrines like sovereign functions, which pull out economic enterprises run by them, come in handy. The latent love for club life and charitable devices and escapist institutions bred by clever capitalism and hierarchical social structure, shows up as inhibitions transmuted as doctrines, interpretatively carving out immunities from the "industrial" demands of labour by labelling many enterprises "non-industries". Universities, clubs, institutes, manufactories and establishments managed by eleemosynary or holy entities, are instances. To objectify doctrinally subjective consternation is casuistry."

53. Subsequent to the above judgment of the Hon'ble Supreme Court, Section 2(j) was redefined vide Amendment Act 46/1982. Ironically, the amendment of the year 1982 is still dormant and yet to be brought into force.

54. While so, there were two conflicting decisions of a Three-Judge Bench in **Chief Conservator of Forests V. Jagannath Maruthi Kondhare, 1996 (2) SCC 293,** and a Two-Judge Bench in **State of Gujarat V. Pratam Singh Narsingh Parmer, 2001 (9) SCC 713,** which lead to the reference in **State of U.P. Vs. Jai Bir Singh, 2005 (5)**

SCC 1. However, the Constitution Bench of the Supreme Court in **Jai Bir Singh case (cited supra)** also called for a reconsideration of the reasoning in the **Bangalore Water Supply and Sewerage Board case (cited supra)** and directed the matter to be placed before appropriate Bench observing as follows :

> *"45. We do not consider it necessary to say anything more and leave it to the larger Bench to give such meaning and effect to the definition clause in the present context with the experience of all these years and keeping in view the amended definition of "industry" kept dormant for long 23 years. Pressing demands of the competing sectors of employers and employees and the helplessness of the legislature and the executive in bringing into force the Amendment Act compel us to make this reference."*

55. Though referred on 05.05.2005, the matter was placed before a seven judge Bench only in 2017. Since the judgement under reference had been passed by seven judges, the Bench felt that it would be appropriate that the matter be placed before nine judges and ordered so in the following terms on 02.01.2017 in ***State of U.P.v. Jai Bir Singh (2017) 3 SCC 311***:

> *"We have heard the learned counsel for the parties at considerable length. We have also been taken through relevant passages of the decision of this Court in Bangalore Water Supply & Sewerage Board v. A. Rajappa, (1978) 2 SCC 213 and the reference order passed by a five-Judge Bench of this Court pursuant to which these matters have been*

placed before us. Having given our anxious consideration to the contentions urged at the Bar and the serious and wide ranging implications of the issue that fall for determination as also the fact that serious doubts have been expressed in the reference order about the correctness of the view taken in Bangalore Water Supply case (supra), we are of the opinion that these appeals need to be placed before a Bench comprising nine Judges to be constituted by the Chief Justice.

2. We order accordingly. The papers be now placed before the Chief Justice for constituting an appropriate nine-Judge Bench to answer the questions raised in the reference order dated 5-5-2005 passed by the five-Judge Bench in State of U.P. v. Jai Bir Singh, (2005) 5 SCC 1."

The decision of the larger Bench is yet awaited.

56. Again, referring to **Jai Bir Singh case (cited supra),** the Hon'ble Supreme Court held in paragraph 38 as follows:

*"38. We also wish to enter a caveat on confining "sovereign functions" to the traditional so described as "inalienable functions" comparable to those performed by a monarch, a ruler or a non-democratic government. The learned Judges in Bangalore Water Supply & Sewerage Board case (1978) 2 SCC 213 seem to have confined only such sovereign functions outside the purview of "industry" which can be termed strictly as constitutional functions of the three wings of the State i.e. executive, legislature and judiciary. The concept of sovereignty in a constitutional democracy is different from the traditional concept of sovereignty which is confined to "law and order", "defence", "law-making" and "justice dispensation". **In a democracy governed by the Constitution the sovereignty vests in the people and the State is obliged to discharge its constitutional obligations contained in the directive principles of State policy in Part IV of the Constitution of India. From that point of view, wherever the Government undertakes public welfare activities in discharge of***

its constitutional obligations, as provided in Part IV of the Constitution, such activities should be treated as activities in discharge of sovereign functions falling outside the purview of "industry". Whether employees employed in such welfare activities of the Government require protection, apart from the constitutional rights conferred on them, may be a subject of separate legislation but for that reason, such governmental activities cannot be brought within the fold of industrial law by giving an undue expansive and wide meaning to the words used in the definition of industry."

(emphasis supplied)

57. The Five-Judge Bench also was in full agreement with the unanimous decision of **Management of Safdarjung Hospital V. Kuldip Singh Sethi, 1970 (1) SCC 735,** on the interpretation of the definition clause holding that 'industry' is accepted to mean only trade and business manufacture or undertaking analogous to trade or business for the production of material goods or wealth and material services.

58. Further, it was observed in paragraph 42 about the role and necessity of the service activities of the hospitals and educational institutions in the following manner:

"42. In construing the definition clause and determining its ambit, one has not to lose sight of the fact that in activities like hospitals and education, concepts like right of the workers to go on "strike" or the employer's right to "close down" and "lay off" are not contemplated because they are services in which the motto is "service to the

community". If the patients or students are to be left to the mercy of the employer and employees exercising their rights at will, the very purpose of the service activity would be frustrated.

* * *

44. We conclude agreeing with the conclusion of the Hon'ble Judges in the case of State of Bombay v. Hospital Mazdoor Sabha, AIR 1960 SC 610:

"[T]hough Section 2(j) used words of very wide denotation, a line would have to be drawn in a fair and just manner so as to exclude some callings, services or undertakings."

(emphasis supplied)

This Court must, therefore, reconsider where the line should be drawn and what limitations can and should be reasonably implied in interpreting the wide words used in Section 2(j). That no doubt is rather a difficult problem to resolve more so when both the legislature and the executive are silent and have kept an important amended provision of law dormant on the statute-book"

59. It is, thus, apparent that the Hon'ble Bench intended to re-define an industry for the purposes of the ID Act.

60. It is in view of the above discussion that the issue of whether the reference to the Larger Bench will have any bearing on the impugned notification has to be seen.

61. Under Section 1(4) of the ESI Act, the provisions of the said Act automatically apply to all factories including Government Factories, other

than seasonal factories with an inbuilt exemption clause. Whereas, under Section 1(5), they have reserved power to the State Governments to extend the provisions of the said Act or any of them to any other establishment or class of establishments, industrial, commercial, agricultural or otherwise.

62. A plain reading of Sections 1(4) or 1(5) only go to show that all kinds of establishments can be covered through a notification by giving prior notice of six months. It is also relevant to note that all the cases decided by various High Courts challenging the Section 1(5) notifications covering educational institutions are after **Jai Bir Singh (supra).** The SLP against the Judgment of the Kerala High Court in **CBSE School Management's Association V. State of Kerala, 2010-II-LLJ 240,** was dismissed by the Hon'ble Supreme Court. Though orders dated 09.06.2015 and 16.06.2015 dispose the writ appeals finally, they are clearly of an interim nature. We are thus of the view that the challenge to the Notification may well be decided based on settled law. In this regard, reference is made to paragraphs 3 and 4 of the judgment of the Hon'ble Apex Court in **State of Orissa Vs. Dandasi Sahu, 1988 (4) SCC 12,** as follows:

> *"3. Being aggrieved thereby the State of Orissa has preferred this appeal. In support of this appeal, it was submitted that the award in question was a lump sum of money and it was without any reason, in*

favour of the respondent. It was also submitted that the validity of the non-reasoned award is awaiting determination by a larger Bench of this Court. Hence, it was urged that this question should await decision of the larger Bench. In the facts and circumstances of the case, we are of the opinion that we would not be justified in acceding to this request on the part of the appellant. In this case the submission that the award was bad being an unreasoned one, was neither mooted before the learned Subordinate Judge nor before the High Court. This contention was also not raised in the objection to the award, filed originally. It is only in the special leave petition that such a plea has been raised for the first time. Arbitration is resorted to as a speedy method of adjudication of disputes. Stale and old adjudication should not be set at naught or examination of that question kept at bay on the plea that the point is pending determination by a larger Bench of this Court. Even if it is held ultimately that the unreasoned award per se is bad, it is not sure whether such a decision would upset all the awards in this country which have not been challenged so far. Certainly, in the exercise of our discretion under Article 136 of the Constitution and in view of the facts and circumstances of this case, we would not be justified in allowing the party to further prolong or upset adjudication of old and stale dispute.

4. In that view of the matter, we think that the pendency of this point before the larger Bench should not postpone the adjudication and disposal of this appeal in the facts of this case. The law as it stands today is that awards without reasons are not bad per se. Indeed, an award can be set aside only on the ground of misconduct or on an error of law apparent on the face of the award. This is the state of law as it is today and in that context the contention that the award being an unreasoned one is per se bad, has no place on this aspect as the law is now. This contention is rejected."

63. When the Division Bench passed the orders referred to in Question No.(i), the reference in **Jai Bir Singh** was cited without pointing out the fact that the said reference was not under the ESI Act. A reading

of the Division Bench order dated 09.06.2015 (supra), also goes to show that the submissions of the learned counsels were just recorded. Thus, the final orders of interim nature were invited by the learned counsels from the Division Bench of this Court.

64. The order of reference dated 02.03.2020 passed by the First Bench also has dealt with the same in paragraphs 32, 33 and 34, which are usefully extracted hereunder:

> *"32. The said reference, prima facie, in our opinion, does not in any way concern the interpretation of the extended meaning of the word 'otherwise' as used in Section 1 of the Employees State Insurance Act, 1948. In view of the above, we find that the reference before the Apex Court appears to have not been correctly understood by the Division Benches of this Court while disposing of the two appeals vide orders dated 09.06.2015 and 16.06.2015. The order in the case of State of U.P., v. Jai Bir Singh (supra) is in no way concerned with the definition and interpretation of the word 'employee' as used in the Employees State Insurance Act, 1948. We are, therefore, prima facie in agreement with the learned Counsel for the respondents at this stage that the reference pending before the Hon'ble Supreme Court cannot be said to be a legal impediment for us to proceed to decide the issue presently involved.*
>
> *33. The contention of the learned Counsel for the petitioners that with the disposal of two appeals on 09.06.2015 and 16.06.2015, a finality is attached, cannot be accepted inasmuch as firstly the order is by consent and secondly, it does not decide any legal issue finally either way. The order has simply continued an interim arrangement pending disposal of the reference before the Hon'ble Supreme Court in the case of State of U.P., v. Jai Bir Singh (supra). Thus, there is no opinion*

expressed at all so as to give rise to any conflict between the judgments of the Kerala High Court as followed by the learned Single Judge of this Court in the case of Maharaja College of Arts and Science (supra) and the aforesaid two orders dated 09.06.2015 and 16.06.2015. In the absence of any such apparent conflict between two final decisions, this, in our opinion, may not be a case giving rise to a reference for being answered by a Larger Bench. Even otherwise, it is settled law that an interim order does not have a precedentiary value and does not have a binding effect. The final disposal of the appeals as noted above only make the interim arrangement absolute making it dependent on the outcome of a reference before the Hon'ble Supreme Court, which, prima facie, in our opinion, does not concern the present subject matter so as to attach any element of either finality or a legal impediment in proceeding with the matter.

34. The third question is about the propriety of awaiting of a decision by the Hon'ble Supreme Court in the wake of the orders that have been passed by the learned Counsel for the petitioners. Since the legality of the issue as observed above, is not pending consideration before the Hon'ble Supreme Court, that does not prima facie appear to be an impediment in propriety for this Co-ordinate Bench to proceed with the matter. Consequently, neither legality nor propriety are in any way involved so as to give rise to a doubt on these issues to be answered by a Larger Bench."

65. We are also in full agreement with the above views expressed by the First Bench in the reference order. Therefore, as referred supra in **State of Orissa Vs. Dandasi Sahu, 1988 (4) SCC 12,** the pendency of reference before a Larger Bench cannot be a ground to postpone the hearing for deciding the issue.

66. At this juncture, it is relevant to note that the Hon'ble Apex Court has held that notwithstanding the reference pending before a Larger Bench, the interpretation of the term 'industry', as has been given in **State of Maharashtra V. Sarva Shramik Sangh, Sangli and Others, 2013 (16) SCC 16** holds good and the same reads as follows :

> *"27. It is, however, contended on behalf of the appellant that the said undertaking was being run by the Irrigation Department of the first appellant, and the activities of the Irrigation Department could not be considered to be an "industry" within the definition of the concept under Section 2(j) of the ID Act. As noted earlier, the reconsideration of the wide interpretation of the concept of "industry" in Bangalore Water Supply and Sewerage Board v. A.Rajappa, (1978) 2 SCC 213 is pending before a larger Bench of this Court. However, as of now we will have to follow the interpretation of law presently holding the field as per the approach taken by this Court in State of Orissa v. Dandasi Sahu, (1988) 4 SCC 12, referred to above. The determination of the present pending industrial dispute cannot be kept undecided until the judgment of the larger Bench is received."*

67. In the light of the above discussion, we are inclined to hold that the decision in regard to the validity of the impugned notification issued under Section 1(5) of the ESI Act could well have been taken and the postponement of the same pending decision of the reference in Jai Bir Singh by the larger Bench, was not warranted. Therefore, question No.(i) is answered in the negative and hence, the necessity to answer question No.(ii) does not arise.

Question no.III :

68. Question No.(iii) of the Order of Reference reads as follows :

> *"Whether unaided private educational institutions can be treated to be an establishment within the meaning of Section 1(5) of the Employees State Insurance Act, 1948 and be capable of being governed by notifications issued under the 1948 Act as being an establishment being covered within the word "otherwise" ?"*

69. Mr.K.M.Vijayan, learned Senior Counsel submitted that this question cannot be argued now as this question goes to the core issue whether educational institutions are covered under the term 'industry', which is under reference by the Hon'ble Supreme Court.

70. The Senior Counsels appearing for the educational institutions endeavoured to impress upon us that the phrase "or otherwise" in Section 1(5) of the ESI Act must be interpreted "*ejusdem generis*". The rule of interpretation known as "*ejusdem generis*" rule has been discussed in several recent cases including the recent Division Bench Judgment of the Calcutta High Court in **Principal Secretary, Department of Labour V. Om Dayal Educational & Research Society and Others, (2019) SCC OnLine Cal 5174.** Paragraph 14 of the said judgment reads as follows:

> *"14. The learned counsel for the respondent-writ petitioners argues that the phrase "or otherwise" in Section 1(5) must be interpreted ejusdem generis. The phrase ejusdem generis and its applicability as a rule or principle of statutory interpretation and*

construction has been explained in various legal and judicial dictionaries. The relevant passages from the said dictionaries are set out hereinbelow: —

***Black's Law Dictionary (10th edn.)** at p. 631:*

*'**ejusdem generis**…..[Latin "of the same kind or class"] (17c) **1.** A canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed. For example, in the phrase horses, cattle, sheep, pigs, goats, or any other farm animals, the general language or any other farm animals - despite its seeming breadth - would probably be held to include only four-legged, hoofed mammals typically found on farms, and thus would exclude chickens. - Also termed Lord Tenterden's rule. Cf. EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS; NOSCITUR A SOCIIS; RULE OF RANK.**2.** Loosely, NOSCITUR A SOCIIS.*

"Of these canons, ejusdem generis, still occasionally applied today, provides that when a list of specific words is followed by a broader or more general term, the broader term is interpreted to include only potential members of a class similar to those denoted by the specific words. An example from the sixteenth century is the Archbishop of Canterbury's case, in which the King's Bench used the principle in interpreting a statute that contained a list of 'inferior' means of conveyance, followed by the phrase 'or any other means.' Even though 'any other means' would seem to include all other types of conveyance, the court limited this catchall phrase to other inferior means of conveyance by an act of Parliament. Obviously, these canons or maxims presuppose both a careful drafting of the text and a close reading by the judges interpreting it." Peter M. Tiersma, Parchment Paper Pixels: Law and the Technologies of Communication 152 (2010).'

***Judicial Dictionary (15th edn., 2011, Vol. 1)** at p. 565:*

*'**Rule explained.** When in a statute, particular classes are mentioned by name and then are followed by general words, the general words are sometimes construed ejusdem generis i.e. limited to the same category or genus comprehended by the particular words. But it is not necessary that this rule must always apply. The nature of the special words and the general words must be considered before the rule is applied. It follows, therefore, that interpretation ejusdem generis or noscitur a sociis need not always be made when words showing particular classes are followed by general words. Before the general words can be so interpreted, there must be a genus constituted or a category disclosed with reference to which the general words can and are intended to be restricted. [Jagdish Chandra Gupta v. Kajaria Traders (India) Ltd., AIR 1964 SC 1882.'*

*'**Rule.** Is one to be applied with caution and not pushed too far, as in the case of many decisions, which treat it as automatically applicable, and not as being, what it is, a mere presumption, in the absence of other indications of the intention of the legislature. [State of Bombay v. Ali Gulshan, AIR 1955 SC 810, 812]*

It is essential for application of the 'ejusdem generis rule' that enumerated things before the general wordsmust constitute a category or a genus. [Housing Board of Haryana v. Haryana Housing Board Employees' Union, (1996) 1 SCC 95, 108 (SC)]'

***The Major Law Lexicon (4th edn., 2010, Vol. 3)** at p. 2255:*

'The ejusdem generis rule strives to reconcile the incompatibility between specific and general words. This doctrine applies when:

(i) the statute contains an enumeration of specific words;

(ii) the subjects or enumeration constitute a class or category;

(iii) that class or category is not exhausted by the enumeration;

(iv) the general term follows the enumeration;

(v) there is no indication of a different legislative intent. Amar Chandra Chakraborty v. Colletor of Excise, (1972) 2 SCC 442 ; ACCE v. RamdevTabacco Co., 1991 (51) ELT 631 (SC)"

71. The rule may be explained as follows in the given context: If a general word follows particular and specific words of the same nature as itself, the general word takes its meaning from them and is held to be restricted to the same genus as those are more limited words, unless there be something to show that a wider sense is intended to be borne by the general word. "*Ejusdem generis*" rule is often useful or convenient, but it is merely a rule of construction.

72. When general words follow specific words in a statute, the general words are read to embrace only objects similar to those objects of the specific words. The rule recognizes and gives effect to both the specific and general words by using the class indicated by the specific words to extend the scope of the statute with the general words to exclude additional terms or objects within the class. The doctrine of *ejusdem generis* is only interpretative. While applying the same certain conditions are to be followed:

(1) The statute contains an enumeration by specific words;

(2) The members of the enumeration suggest a class;

(3) The class is not exhausted by the enumeration;

(4) A general reference supplementing the enumeration, usually following it;

(5) There is no clearly manifested intent that the general terms be given a broader meaning than the doctrine requires.

73. It is relevant to note the judgments of the Hon'ble Apex Court in **K.K.Kochunni V. State of Madras, AIR 1960 SC 1080** and **Bangalore Turf Club V. Regional Director, ESI Corporation, 2014 (9) SCC 657.** In the above cases, holding that a dictionary meaning of a word cannot be looked at where the said word has been statutorily defined or judicially interpreted, but where there is no such definition or interpretation, the Court may take the aid of dictionaries to have the meaning of the word in common parlance and in **Bangalore Turf Club** held as follows:

> *"6. The meaning of the words "or otherwise" after the words "industrial, commercial or agricultural" establishments in sub-section (5) of Section 1 indicates that the Government can extend the ESI Act or any portion thereof to any other establishment or class of establishments. The genus lies in the words "any other establishment or class of establishments". The three words industrial, commercial and agricultural represent a specie. Since the legislature did not want to restrict the operation of the ESI Act to these three species, has used the catch words "or otherwise".*

31. We may safely conclude that the literal rule of construction may be the primary approach to be utilised for interpretation of a statute and that words in the statute should in the first instance be given their meaning as understood in common parlance. However, the ESI Act is a beneficial legislation. It seeks to provide social security to those workers as it encompasses. In the light of the cases referred above, it may be seen that the traditional approach can be substituted. A dictionary meaning may be attached to the words in a statute in preference over the traditional meaning. However, for this purpose as well, the scheme, context and objects of the legislature must be taken into consideration. Taking into due consideration the nature and purpose of the ESI Act, the dictionary meaning as understood in the context of the said Act would be preferable to achieve the objects of the legislature.

37. The term "establishment" would mean the place for transacting any business, trade or profession or work connected with or incidental or ancillary thereto. It is true that the definition in dictionaries is the conventional definition attributed to trade or commerce, but it cannot be wholly valid for the purpose of constructing social welfare legislation in a modern welfare State. The test of finding out whether professional activity falls within the meaning of the expression "establishment" is whether the activity is systematically and habitually undertaken for production or distribution of the goods or services to the community with the help of employees in the manner of a trade or business in such an undertaking. If a systematic economic or commercial activity is carried on in the premises, it would follow that the establishment at which such an activity is carried on is a "shop". This Court, in Hyderabad Race Club case [ESI Corpn. v. Hyderabad Race Club, (2004) 6 SCC 191] , keeping in view the systematic commercial

activity carried on by the club has held that the race club is an establishment within the meaning of the said expression as used in the notification issued under Section 1(5) of the ESI Act. Therefore, in our considered view, the view expressed by this Court is in consonance with the provisions of the ESI Act and also settled legal principles. Therefore, the said decision does not require reconsideration."

74. Emphasizing the word "or otherwise", the learned AG submitted that these words give wider power to the Government to bring in any establishment, for example even an Advocate's office, which otherwise would not be an industry within the meaning of the ESI Act. That is the reason, there is no definition deliberately to what was "establishment" under the ESI Act giving widest possible interpretation and the Government has power to expand/extend it to any establishment.

75. There is no definition for the word "Establishment" in the ESI Act, and it has a completely different definition on the other Act, which was not referred to.

76. Section 1(6) of the ESI Act, which speaks that "A factory or an establishment to which this Act applies shall continue to be governed by the said Act notwithstanding that the number of persons employed therein at any time falls below the limit specified by or under this Act or the manufacturing process therein ceases to be carried on with the aid of

power." Thus, learned Advocate General submitted that once the factory or establishment is covered under the ESI Act, it would continue forever.

77. Section 2(9) of the ESI Act, which defines "employee" and submitted that it is of the widest possible definition, as it defines "any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and (i) who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment, whether such work is done by the employee in the factory or establishment or elsewhere" and also emphasised that it does not limit the type of persons, who is employed and the exemption given is to the employees of the members of the three forces and the person whose wages (excluding remuneration for overtime work) exceed such wages as may be prescribed by the Central Government.

78. The wages presently fixed by the Central Government with effect from 01.01.2017 is Rs.21,000/-, in term of Rule 50 of the Employees' State Insurance (Central) Rules, 1950.

79. After referring Section 2(j) of the ID Act, 1947, which defines, "industry", the learned Advocate General drew the attention of this Court to Section 2(s) of the ID Act, which defines workman, as per which, the

"workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person.

80. Thus, it is submitted that to be a workman, (i) a person should be employed in an industry; and (ii) he should be doing manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward. These words have to be read as part beyond genus and a teacher will neither be classified as manual, unskilled or even skilled, technical, operational, clerical or supervisory. That is the reason, they took teacher from workman. Though the teachers do certain number of activities, they will not come within any of these acts and therefore, will not be workmen within the meaning of the ID Act.

81. The Philosopher Aristotle says, "the one exclusive sign of thorough knowledge is the power of teaching. Teaching profession contributes to the elimination of poverty, significantly, through the

provision of education. "vGjjwtpjjtd; ,iwtd; MFk; vd;fpwJ btwwntwif (mjtPuuhk ghz;oau;). The teachers and their supporting staff in any educational institution should be given the utmost privileges in particular, any statutory benefit.

82. One has to look at the primary object of the Act and what is the definition under the Act. The ID Act is predominantly a labour law, it does not mean that the definition contained therein will automatically apply as the definition in the other Act. It is well settled that the definition in one Act cannot be used in the other Act automatically. In the instant case, the scope and object are entirely different. One is to provide regulation of industrial relations, resolution, adjudication, while the other is for medical insurance, health and maternity benefits, etc.

83. It is in the light of the above that Section 1(5) of the ESI Act has to be read. The ESI Act being a socio-economic welfare oriented legislation, it has brought with it the avowed objective of securing the social and economic justice and for upholding the human dignity and it is not a law regulating the education. Curiously, the vires of Section 1(5) of the ESI Act is not under challenge in any of the petitions. It is always the endeavour of the Courts that the social perspective must play upon the interpretative process. Therefore, the ESI Act can treat the private

educational institutions as 'establishments' coming within the meaning of the Act and the term 'otherwise' has clearly been placed to specify that genus of establishments is not restricted to those organisations, which are industrial, commercial or agricultural only, but also includes organisations like educational institutions. The issue No.(iii) is answered accordingly.

Question Nos.V and VI:

84. Before proceeding to deal with Question No.(iv), it is apt to delve into Questions of Reference No.(v) and (vi), which are usefully extracted hereunder:

> *"v. Whether the State or Central Government can notify the applicability of the 1948 Act only after an amendment either under the 1948 Act or the State Acts, keeping in view that the word "insurance" occurring in Section 19 of the 1973 Act and a pari materia provision under the 1976 Act already covers insurance coverage of the teachers and other employees of schools and colleges ?*
>
> *vi. Whether the notification dated 26.11.2010 can be enforced even without an amendment in the provisions as referred to in Question (v)?"*

85. The question is whether the State Government can extend the applicability of the ESI Act, a Central Act, to educational institutions, when the conditions of service in the field of education find place in two State enactments namely, the Private Schools Act, and the Tamil Nadu

Private Colleges Regulation Act, 1976 ("1976 Act"), mentioned supra. The argument is that the field being occupied by the two State enactments, the ESI Act has no application. It appears that the legislative competence of the notification under the ESI Act, 1948 vis-a-vis the provisions of the Act 1973 was not argued before the learned Single Judge and has been raised for the first time before the Division Bench only.

86. The learned Advocate General submitted that the Tamil Nadu Recognised Private Schools (Regulation) Act, 1973 received assent of the Hon'ble President and the Tamil Nadu Private Colleges (Regulation) Act, 1976 was enacted by the President, when the Emergency was proclaimed and the State Legislature was suspended under Article 356 of the Constitution, in exercise of the power conferred under Article 356(1)(b) of the Constitution, after declaring that the power of the Legislature of the State shall be exercisable by or under the authority of the Parliament.

87. Having heard learned counsels in details, we are of the view that the arguments based on repugnancy under Article 254 of the Constitution are misplaced as there is no repugnancy between the two enactments.

88. When the State sends a Bill for assent of the Hon'ble President, the Note forwarded to the Hon'ble President by the State must not only

show what is the repugnancy between the Central act and the State law, but must specify the laws in respect of which it seeks the assent of the Hon'ble President to overcome the potential repugnancy.

89. There is no material to show that at the time when the State sought Presidential assent in respect of the Private School Regulation Act, 1973, it intended to remove any potential repugnancy between the 1973 Act and the ESI Act, 1948. Unless the Central Government is impleaded as a party and notice is served on the Central Government (Attorney General), it would remain a mystery as whether the Hon'ble President had been apprised of the repugnancy. The Hon'ble President while according assent to the 1973 Act, in pith and substance, has accorded assent only in relation to the subject matter of regulating of educational institutions and the conditions of service of the employees therein, as the Hon'ble President cannot be presumed to have considered a specific legislation of general application qua the benefits of health and insurance that stood covered under the ESI Act.

90. Though it is contended that the assent of the Hon'ble President to the subsequent state enactment, i.e., 1973 Act, cannot be equated with the assent to legislation under the 1948 Act, the same was not a subject matter before the Hon'ble President. It is also contended that there is no such material placed before this Court by the petitioners to

substantiate the said argument, which has been taken only in rejoinder affidavit.

91. The further contention is that no amendment was required either under the ESI Act or under the 1973 Act or even the 1976 Act, as the State Government is empowered to issue the notification under the 1948 Act extending the benefits of health and insurance schemes under the ESI Act to the employees and teachers of the private educational institutions.

92. The learned Advocate General relied on **Kaiser-I-Hind Pvt. Ltd V. National Textile Corporation, (2002) 8 SCC 182 ; Rajiv Sarin V. State of Uttarakhand, 2011 (8) SCC 708 ;** and **K.T.Plantation Private Limited V. State of Karnataka, 2011 (9) SCC 1** in this regard.

93. There is no pleading qua repugnancy by the petitioners. In the absence of proper pleadings and proper parties before this Court, the petitioners cannot urge the said ground before this Court and this Court cannot go into the question of repugnancy in this batch of cases.

94. The learned Advocate General emphasised the words in Section 1(4) of the ESI Act that "it shall apply, in the first instance, to all factories (including factories belonging to the Government other than seasonal

factories..." and the proviso to Section 1(4), which says "Provided that nothing contained in this sub-section shall apply to a factory or establishment belonging to or under the control of the Government **whose employees are otherwise in receipt of benefits substantially similar or superior to the benefits provided under this Act**. Thus, it is submitted that if a factory or establishment is belonging to or under the control of the Government and if their employees are in receipt of benefits, which are substantially similar or superior, they come out of the purview of the Act.

95. The learned Advocate General also contended that the Government would always stand on a different footing and thus, the employees and teachers of the Government and aided schools, who have been paid more, are not covered under the ESI Act and that is why, there is a discrimination between the Government and Aided school teachers and such discrimination is there in the Act itself. It is further contended that the proviso to Section 1(4) allows such discrimination and that is the reason also, the Reference Order does not refer to the discrimination.

96. The learned Advocate General also contended that there is no repugnancy between the ESI Act and the 1973 Act, as they are operating on the different field and relied upon the judgment of the Hon'ble Apex Court in **Banatwala and Company V. LIC, 2011 (13) SCC 446,** to

substantiate his arguments. The following paragraphs of the said judgment are usefully extracted hereunder:

> *"55. The question of repugnancy between the law made by Parliament and the law made by the State Legislature may arise in cases when both the legislations occupy the same field with respect to one of the matters enumerated in List III and where a direct conflict is seen between the two. The principles laid down by a Bench of three Judges in Hoechst Pharmaceuticals Ltd. v. State of Bihar, (1983) 4 SCC 45 were reiterated by a Constitution Bench in State of W.B. v. Kesoram Industries Ltd., (2004) 10 SCC 201. .....*
>
> *58. The question with respect to conflict between two such legislations came up before a Bench of three Judges in Vijay Kumar Sharma v. State of Karnataka, (1990) 2 SCC 562 where the question was whether there was any conflict between the Karnataka Contract Carriages (Acquisition) Act, 1976 and the Motor Vehicles Act, 1988. This Court looked into the judgments holding the field and held that there was no conflict between the two. It laid down the law in para 53 as follows:*
>
> > *"53. The aforesaid review of the authorities makes it clear that whenever repugnancy between the State and Central legislation is alleged, what has to be first examined is whether the two legislations cover or relate to the same subject-matter. The test for determining the same is the usual one, namely, to find out the dominant intention of the two legislations. If the dominant intention i.e. the pith and substance of the two legislations is different, they cover different subject-matters. If the subject-matters covered by the legislations are thus different, then merely because the two legislations refer to some allied or cognate subjects they do not cover the same field. The legislation, to be on the same subject-matter must further cover the entire field covered by the other. A provision in one*

legislation to give effect to its dominant purpose may incidentally be on the same subject as covered by the provision of the other legislation. But such partial coverage of the same area in a different context and to achieve a different purpose does not bring about the repugnancy which is intended to be covered by Article 254(2). Both the legislations must be substantially on the same subject to attract the article."

97. In the light of what was discussed hitherto, it is to be seen as to whether the ESI Act, the 1973 Act and the 1976 Act are operating in the same field?. As stated above, the ESI Act is a pre-constitutional law enacted in exercise of powers vested on the Federal Legislature in terms of Entry 27 of List III (Part II) of Schedule VII prescribed under Section 100 of the Government of India Act, 1935 (1935 Act). Schedule VII of the Constitution distributes powers between the State legislature and the Parliament. Under Section 100 of the 1935 Act, the power to legislate on the subject of insurance was vested with the Federal legislature in terms of Entry 37 of List I of Schedule VII. The reason being that the provincial assemblies are excluded from interfering with the Federal law, since several provincial assemblies had legislations covering insurance.

98. However, post framing of the Constitution, the power to legislate qua insurance is solely vested with the Parliament in terms of Entry 47 of List I of Schedule VII under Article 246. Whereas, Entry 25 of

the Concurrent List deals with Education, while Entry 23 and 24 deal with "Social security and social insurance; employment and unemployment" and "Welfare of labour including conditions of work, provident funds, employers' liability, Workmen's Compensation, invalidity and old age pensions and maternity benefits" respectively. Thus, it is clear that the ESI Act can be said to be a Central Act falling under Entries 23 and 24 of the Schedule VII.

99. The 1973 Act is not intended to legislate the subjects covered under Entries 23 and 24, but only with respect to Entry 25, i.e., "education". In order to regulate the functioning of the private schools and the service conditions of teachers and other employees, it was enacted. It cannot be stated that it automatically excludes any other law covering the insurance under Entry 47 of List I or Entires 23 and 24 of List III, merely because Section 19 of the said Act refers to insurance. The natural corollary of the above discussion would be that there is no repugnancy between the provisions of the ESI Act and the 1973 Act, as they entire operate in different fields.

100. It is also to be stated that the State Government is yet to frame any insurance cover to the teachers of private unaided schools and even to the teachers working in self-finance stream in aided institutions. As narrated earlier, the employees could get sickness benefit, medical

benefit, disability benefit, maternity benefit, death benefit and funeral benefit. The petitioner and other institutions have not even placed any material to impress upon this court that they have been extending similar benefits to their employees, leave alone the better scheme. On the other hand, it is disheartening to state that they have been prolonging the implementation of social welfare legislation for nearly a decade, by stalling the impugned notification, which would otherwise have benefited thousands of teachers and other employees.

101. Reliance was placed on the following decisions by the learned Advocate General in this regard:

(i) Qazi Noorul H.H.H. Petrol Pump V. Deputy Director, ESI Corporation, 2009 (15) SCC 30 ;

(ii) Hotels and Restaurants Association V. Star India (P) Ltd., 2006 (13) SCC 753 ;

(iii) Union of India V. R.C.Jain, 1981 (2) SCC 308 ;

(iv) S.Gopal Reddy V. State of A.P., 1996 (4) SCC 596 ;

(v) State of A.P. V. Mohammed Ashrafuddin, AIR 1982 SC 913 ;

(vi) **Maheshwari Fish Seed Farm V. T.N. Electricity Board, 2004 (4) SCC 705 ;** and

(vii) **Peddinti Venkata Murali Ranganatha Desika Iyengar V. Government of A.P., 1996 (3) SCC 75.** It is relevant to extract paragraphs 13 and 14 of the said judgement, which reads as hereunder:

> *"13. The question, in that scenario, which emerges is whether Section 76 is a valid piece of legislation, indirectly repealing the Inams Abolition Act or the judgments of that High Court referred to hereinbefore. It is settled law that repeal of an Act divesting vested rights is always disfavoured. Presumption is against repeal by implication and the reason is based on the theory that the legislation, while enacting a law, has complete knowledge of the pre-existing law on the same subject-matter. In the Principles of Statutory Interpretation by Justice G.P. Singh, (5th Edn. 1992 at pp. 186-87) under the caption "Reference to other statutes" in Chapter IV (External Aids to Construction) it has been stated that "a legislation proceeding upon an erroneous assumption of the existing law without directly amending or declaring the law is ineffective to change the law". "The beliefs or assumptions of those who frame Acts of Parliament cannot make the law" and a mere erroneous assumption exhibited in a statute as to the state of the existing law is ineffective to express an 'intention' to change the law; if, by such a statute, the idea is to change the law, it will be said that "the legislature has plainly misfired". The "legislation founded on a mistaken or erroneous assumption has not the effect of making the law which the legislature had erroneously assumed to be so". The court will disregard such a belief or assumption and also the provision inserted in that belief or assumption. A later statute, therefore, is normally not used as an aid to construction of an earlier one."*
>
> *14. In Sarwan Singh v. Kasturi Lal, (1977) 1 SCC 750, the facts were that Section 19 of the Slum Area Improvement and Clearance Act,*

1956, with a non obstante clause, provided overriding effect to any other law being enforced in slum area. No person except with the previous permission in writing of the competent authority could institute any suit or proceeding for obtaining any decree or order for eviction of a tenant from any building in slum area. The procedure in that behalf had been provided. Chapter III-A of the Delhi Rent (Control) Act was enacted. Sections 14-A, 25-A, 25-B and 25-C were brought on statute. Section 14-A with non obstante clause, empowered the landlord to require his own building for residential accommodation when he was asked to vacate the land allotted by the Government. The question arose: which of the two provisions occupying the same field, would prevail? At p. 433, this Court held that speaking generally, the object and purpose of a legislation assume greater relevance, if the language of the law is obscure for resolving inter se conflicts. Another test may also be applied, though the persuasive force of such a test is one of the factors which combine to give a similar meaning to the language of the law. The test is that the latter enactment must prevail over the earlier one in the case of conflict. Accordingly, it was held that when two or more laws operate on the same field and each contains a non obstante clause, case of conflicts has to be decided with reference to the object and purpose of the law under consideration. In that case, the landlord who was in government house was directed to vacate the house. Special procedure in Chapter III-A was provided to mitigate the hardship to the landlord and to have eviction of his tenant from a premises situated in slum area for his personal occupation. To give effect to the legislative object, in view of the conflict by employing double non obstante clause in the respective provisions occupying the same field, this Court had given effect to legislative intention by harmonious interpretation of both provisions by reconciling the two inconsistent provisions and held that the landlord was entitled to evict his tenant under Section 14-A, despite the special protection given under the Slum Improvement Act."

102. The different decisions cited above would indicate that it is unsafe to construe a statute by a process of etymological analysis and

separating words from their context to give each word some particular definition. What particular meaning should be attached to any word or phrase in an enactment should be gathered from the context, the nature of the subject matter, the purpose or the intention of the statute and the effect of giving them one or permissible meaning on the object to be achieved. The words/definitions are only to convey the idea of the Statute. Therefore, it should be so construed to fit in with the objects of the Statute.

103. The relevant provisions are Section 19 of the 1973 Act and Section 17 of the 1976 Act. Whether Section 19 read with Section 17 would be a bar to the impugned G.O.Ms.No.237, dated 26.11.2010.

104. The power under Section 1(5) of the ESI Act has been used by the State to implement what it had envisaged under Section 19 of the 1973 Act. Therefore, there is no illegality in the manner in which, the State has exercised its power, since the overriding provision itself allows for such an order to be made. The section does not restrict the rules and orders to be made within the said Act above. Perhaps instead of enacting a separate rule in terms of insurance, which would further delay the process, the State Government had thought it fit to extend the already overdue benefit to the employees of educational institutions by issuing the Government Order.

105. Admittedly, there are no rules framed in respect of insurance for private schools employees till date and the private schools also have been keeping silent on the said issue from the date of enactment. Even assuming that the State Government had introduced a statute qua insurance under the 1973 Act, it would not lead to repugnancy between the said rule and the ESI Act in view of the proviso to Section 17 of the 1976 Act. A Government Order or enactment, whichever provides better scheme would survive, while the lesser one would automatically become inapplicable as per the proviso which entitles the employee of better benefits. Therefore, apparently there is no repugnancy between the 1973 Act and 1976 Act and the G.O.Ms.No.237 issued under Section1(5) of the ESI Act and hence, no amendment is required to be made either under the ESI Act or under the State Acts to implement/enforce the G.O.Ms.No.237, dated 26.11.2010.

106. In **Krishna District Co-operative Marketing Society Limited Vs. N.V.Purnachandra Rao, 1987 (4) SCC 99,** the Hon'ble Supreme Court has dealt with the aspect of repugnancy between a State law that has received assent and the Central Act in the following manner :

> *"8. We shall now proceed to consider the merits of the contention that the State Act which is a later Act and which has received the assent of the President should prevail over the provisions of Chapter V-A of the Central Act. The above contention is based on*

Article 254(2) of the Constitution and the argument is that the provisions of Section 40 which deal with termination of service in a shop or an establishment contained in the State Act which is enacted by the State legislature in exercise of its powers under Entry 22 of List III of the Seventh Schedule to the Constitution being repugnant to the provisions contained in Chapter V-A of the Central Act which is an earlier law also traceable to Entry 22 of the List III of the Seventh Schedule to the Constitution should prevail as the assent of the President has been given to the State Act. It is true that the State Act is a later Act and it has received the assent of the President but the question is whether there is any such repugnancy between the two laws as to make the provisions of the Central Act relating to retrenchment ineffective in the State of Andhra Pradesh. It is seen that the State Act does not contain any express provision making the provisions relating to retrenchment in the Central Act ineffective insofar as Andhra Pradesh is concerned. We shall then have to consider whether there is any implied repugnancy between the two laws. Chapter V-A of the Central Act which is the earlier law deals with cases arising out of lay off and retrenchment. Section 25-J of the Central Act deals with the effect of the provisions of Chapter V-A on other laws inconsistent with that chapter. Sub-section (2) of Section 25-J is quite emphatic about the supremacy of the provisions relating to the rights and liabilities arising out of lay off and retrenchment. These are special provisions and they do not apply to all kinds of termination of services. Section 40 of the State Act deals generally with termination of service which may be the result of misconduct, closure, transfer of establishment etc. If there is a conflict between the special provisions contained in an earlier law dealing with retrenchment and the general provisions contained in a later law generally dealing with terminations of service, the existence of repugnancy between the two laws cannot be easily presumed. In Maxwell on the Interpretation of Statutes (12th edn.) at page 196 it is observed thus:

" 'Now if anything be certain it is this,' said the Earl of Selborne L.C. in The Vera Cruz [(1884) 10 AC 59] at p. 68 'that

where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so'. In a later case, Viscount Haldane said: 'We are bound… to apply a rule of construction which has been repeatedly laid down and is firmly established. It is that wherever Parliament in an earlier statute has directed its attention to an individual case and has made provision for it unambiguously, there arises a presumption that if in a subsequent statute the legislature lays down a general principle, that general principle is not to be taken as meant to rip up what the legislature had before provided for individually, unless an intention to do so is specially declared. A merely general rule is not enough even though by its terms it is stated so widely that it would, taken by itself, cover special cases of the kind I have referred to."

9. We respectfully agree with the rule of construction expounded in the above passage. By enacting Section 25-J(2) Parliament, perhaps, intended that the rights and liabilities arising out of lay off and retrenchment should be uniform throughout India where the Central Act was in force and did not wish that the States should have their own laws inconsistent with the Central law. If really the State legislature intended that it should have a law of its own regarding the rights and liabilities arising out of retrenchment it would have expressly provided for it and submitted the Bill for the assent of the President. The State legislature has not done so in this case. Section 40 of the State Act deals with terminations of service generally. In the above situation we cannot agree with the contention based on Article 254(2) of the Constitution since it is not made out that there is any implied repugnancy between the Central law and the State law."

107. Besides, Section 61 of the ESI Act bars benefit under other enactments as follows:

> "**61. Bar of benefits under other enactments.** — When a person is entitled to any of the benefits provided by this Act, he shall not be entitled to receive any similar benefit admissible under the provisions of any other enactment."

When the ESI Act has already excluded the operation of any other enactment in the field that is governed by the ESI Act, a State cannot enact any Act or rule providing benefits that are similar to the benefits provided under the ESI Act.

108. Even otherwise, Section 87 of the ESI Act provides for exemption for those employer providing better benefits to the employees of educational institutions and the said provision reads as follows:

> *"87. Exemption of a factory or establishment or class of factories or establishments. — The appropriate Government may by notification in the Official Gazette and subject to such conditions as may be specified in the notification, exempt any factory or establishment or class of factories or establishments in any specified area from the operation of this Act for a period not exceeding one year and may from time to time by like notification renew any such exemption for periods not exceeding one year at a time.*
>
> *Provided that such exemptions may be granted only if the employees' in such factories or establishments are otherwise in receipt of benefits substantially similar or superior to the benefits provided under this Act :*

Provided further that an application for renewal shall be made three months before the date of expiry of the exemption period and a decision on the same shall be taken by the appropriate Government within two months of receipt of such application."

109. If the petitioners' institutions are agreeable or acceptable for the enactment qua insurance by the State Government, it is not fair on their part to challenge the Government Order, which is not in the form acceptable to them. It is only a hyper-technical objection. The Central and State legislation only provide for certain benefits to the employees. Section 28 of the 1973 Act has been carefully worded in such a way that neither the mode of implementation nor the instrument granting the best benefit would be struck down merely because of the overriding provision.

110. Thus, the last phrase 'or otherwise' used in Section 1(5) of the ESI Act has wide amplitude. The legislature in exercise of its wisdom has empowered the Government to bring in not only industrial, commercial or agricultural establishments, but also other establishments, including education Institutions/establishments. It is argued that whether the provisions of the ESI Act can be made applicable for the self-financing unaided institutions. We do not find any legal impediment in bringing such institutions also within the purview of this Act. Section 1(5) of the ESI Act enables the State Government to extend the scheme to any

establishments or class of establishments unaided educational institutions being no exception.

111. In **Haryana Unrecognized Schools' Association V. State of Haryana, 1996 (4) SCC 235,** the Hon'ble Supreme Court has held that the teachers will not come within the purview of the Minimum Wages Act and therefore, any notification fixing the minimum wages in respect of them will be invalid. It is relevant to refer the paragraph 11 of the said judgment in this regard :

> "11. Applying the aforesaid dictum to the definition of employee under Section 2(*i*) of the Act it may be held that a teacher would not come within the said definition. In the aforesaid premises we are of the considered opinion that the teachers of an educational institution cannot be brought within the purview of the Act and the State Government in exercise of powers under the Act is not entitled to fix the minimum wage of such teachers. The impugned notifications so far as the teachers of the educational institution are concerned are accordingly quashed "

112. Though we would not embark on the individual factual disputes before us, in the light of the above referred judgment and also there are substantial number of private educational institutions run by the religious minority having protection under Article 30(1) of the Constitution, which

are represented by Fr.Xavier Arulraj, learned Senior Counsel before us, we would specifically deal with the same.

113. In **Haryana Unrecognized Schools' Association,** referred supra, the Hon'ble Apex Court placed reliance on the judgment in **A.Sundarambal V. Government of Goa, Daman and Diu, 1988 (4) SCC 42,** and held that the teachers would not come within the definition of the term 'employee' as found in the Minimum Wages Act. In **Sundarambal's case,** it was found a teacher is not a 'workman' within the meaning of Section 2(s) of the ID Act, even though the educational institutions can be considered to be 'industry' in terms of Section 2(j) of the ID Act. As we have already held that the impugned notification issued under the ESI Act is an independent notification under Section 1(5) of the ESI Act and that the term 'industry', as defined in the ID Act need not be gone into once again. However, the teachers can be considered as employees so as to become 'insured persons' under the ESI Act.

114. In **Christian Medical College Hospital Employees' Union and another V. Christian Medical College Vellore Association and Others, 1987 (4) SCC 691,** it has been held that the labour welfare legislation will apply even to minority institutions, notwithstanding Article 30(1) of the Constitution and the relevant paragraph of the said judgment is as follows :

"18. It has to be borne in mind that these provisions have been conceived and enacted in accordance with the principles accepted by the International Labour Organisation and the United Nations Economic, Social and Cultural Organisation. The International Covenant on Economic, Social and Cultural Rights, 1966 which is a basic document declaring certain specific human rights in addition to proclaiming the right to work as a human right treats equitable conditions of work, prohibition of forced labour, provision for adequate remuneration, the right to a limitation of work hours, to rest and leisure, the right to form and join trade unions of one's choice, the right to strike etc. also as human right. The Preamble to our Constitution says that our country is a socialist republic. Article 41 of the Constitution provides that the State shall make effective provision for securing right to work. Article 42 of the Constitution provides that the State shall make provision for securing just and humane conditions of work and for maternity relief. Article 43 of the Constitution states that the State shall endeavour to secure by suitable legislation or economic organisation or in any other way to all workers agricultural, industrial or otherwise work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities. These rights which are enforced through the several pieces of labour legislation in India have got to be applied to every workman irrespective of the character of the management. Even the management of a minority educational institution has got to respect these rights and implement them. Implementation of these rights involves the obedience to several labour laws including the Act which is under consideration in this case which are brought into force in the country. Due obedience to those laws would assist in the smooth working of the educational institutions and would facilitate proper administration of such educational institutions. If such laws are made inapplicable to minority educational institutions, there is very likelihood of such institutions being subjected to maladministration. Merely because an impartial tribunal is entrusted with the duty of resolving disputes relating to employment, unemployment, security of work and other conditions of workmen it cannot be said that the right guaranteed under Article 30(1) of the Constitution of India is violated. If a creditor of a

minority educational institution or a contractor who has built the building of such institution is permitted to file a suit for recovery of the money or damages as the case may be due to him against such institution and to bring the properties of such institution to sale to realise the decretal amount due under the decree passed in such suit is Article 30(1) violated? Certainly not. Similarly the right guaranteed under Article 30(1) of the Constitution is not violated, if a minority school is ordered to be closed when an epidemic breaks out in the neighbourhood, if a minority school building is ordered to be pulled down when it is constructed contrary to town planning law or if a decree for possession is passed in favour of the true owner of the land when a school is built on a land which is not owned by the management of a minority school."

115. Fr.Xavier Arulraj, learned Senior Counsel also mentioned that many of the private educational institutions belonging to the religious minority, for whom he is representing, were already advised to contribute towards ESI and they have also either paid or agreed to pay the contribution, interest and also the damages, after obtaining appropriate orders in that regard and only seeks indulge of this Court in extending time to do so. Though the High Court under Article 226 of the Constitution cannot interfere and grant either extension of time, waiver, etc., it is open to the ESI Corporation authorities to take appropriate action, as and when such cases arise for their consideration.

116. Accordingly, question Nos.(v) and (vi) are answered, as above.

Question No.IV :

117. The final question of reference to be decided, i.e., Question No.(iv), reads as follows:

> *"iv. Whether the State discriminated between private unaided educational institutions on the one hand and the public and government aided private educational institutions on the other by issuing a notification applying the same only to the former, which may amount to an act of invidious discrimination under Article 14 of the Constitution of India so as to enable the petitioners to resist the impugned notification dated 26.11.2010 ?"*

118. It is submitted by the petitioners' counsels that the definition of private school, as per the Tamil Nadu Private Schools (Regulation) Act, 1973, excludes both unaided and aided schools. In the absence of any other substitute of the ESI Act to the private aided schools, the discrimination is striking on the face of it and violative of Article 14.

119. After the advent of the Right of Children to Free and Compulsory Education Act, 2005 (in short, "RTE Act"), the question of aided or unaided goes, as all the schools are mandated to surrender 25% of their seats and get aid from the government for the Students admitted under the RTE Act. The proviso to Section 1(4) of the ESI Act came to be inserted with effect from 20.10.1989 by the Amendment Act 29/1989.

After the said amendment, the applicability of the provisions of the ESI Act to the Government owned or controlled establishments are not automatic, when the Government is of the opinion that the benefits given to the employees under those establishments are substantially similar or superior to the benefits provided under the said Act.

120. However, it is now mentioned by the State that the notification No.II 2/LE/52/2013 dated 02.01.2013 issued by the State, has extended the provision of the ESI Act to public, private and aided educational institutions as well, which reads as follows :

> "Extension of Employees' State Insurance Scheme to certain New sections of Establishments in all the Implemented Areas under State Insurance Act.
>
> **No.II(2)/LE/52/2013** - In exercise of the powers conferred by sub-section (5) of Section 1 of the Employees' State Insurance Act, 1948 (Central Act XXXIV of 1948), the Governor of Tamil Nadu in consultation with the Employees' State Insurance Corporation and with the approval of the Central Government, after giving one months' notice as required therein, hereby extends the provisions of the said Act to the class of establishments as specified in the Schedule below, with effect on and from the date of publication of this notification in the Tamil Nadu Government Gazette.

THE SCHEDULE

Description of class of establishments (1)	Areas in which the establishments are situated (2)
The Following Establishments wherein ten or more persons are employed, or were employed on any day of the preceding twelve months, namely :- (i) Shops ; (ii) Hotels ; (iii) Restaurants ; (iv) Road Motor Transport Establishments ; (v) Cinemas including preview theatres; (vi) Newspaper Establishment as defined in clause (d) of Section of the Working Journalists and other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955 (Central Act 45 of 1955) ; **(vii) Educational institutions (including public, private, aided or partially aided) run by individuals, trustees, societies or other organisations ;** (viii) Medical institutions (including corporate, Joint sector, trust charitable and private ownership hospitals, nursing homes, diagnostic centres, pathological labs).	All areas where provisions of the Employees' State Insurance Act, 1948 (Central Act XXXIV of 1948) have already been brought into force under sub-section (3) of Section 1 of the said Act.

The said notification is not put to challenge till today. Therefore, there cannot be any discrimination, as alleged. Hence, this question is answered accordingly.

Cont.P.No.1960 of 2019 :

121. According to the petitioner in Cont.P.No.1960 of 2019, they filed W.P.No.24612 of 2013 challenging the notification, which was disposed of by virtue of the common order dated 16.06.2015 in W.A.Nos.918 of 2013, etc. batch. While so, the Deputy Director, Sub Regional Office, ESI Corporation, had issued a notice in No.56001135390001302/9102019312, dated 10.09.2018 asking the members of the petitioner association to pay a sum of Rs.17,53,860/- towards the ESI Contribution, for which, the contempt petitioner also had suitably replied on 11.10.2019 mentioning about the interim order granted by this Court, which is still in force and till such time the matter is decided by the Hon'ble Supreme Court finally, any demand by the ESI Corporation would be contemptuous. Even after the receipt of the said reply, the ESI Corporation had issued another notice dated 22.10.2019 calling upon the contempt petitioner association to appear for an enquiry on 13.11.2019 for the purpose of determining the contribution for ESI. Aggrieved by the said demand, the contempt petition has been filed.

122. Mr.R.Singaravelan, learned Senior Counsel, is right in arguing that the ESI Corporation ought not to have proceeded with the demand notice, despite the order passed by the Division Bench being in force. The ESI Corporation also cannot be found fault with, as there were various orders passed by this Court, which caused confusion. Therefore, till such time, the orders were clarified, the ESI Corporation ought not to have issued the demand notice. However, it is now learnt that the Corporation has not taken any coercive steps for the recovery or levied any damages or interest for damages, in view of the filing of the contempt petition.

123. From the above, it is clear that the contempt petitioner cannot be said to be seriously prejudiced. Though the authorities issued the demand notice as a matter of routine, without taking into account the orders of this Court, according to us, the same need not be viewed seriously at this point of time. Accordingly, the Contempt Petition is closed.

124. Before parting with this matter, we would like to mention that ESI also should increase/improve their services and facilities in their hospitals to make them more preferred ones by the subscribers to the scheme.

125. It appears that the Parliamentary Panel has suggested the Ministry of Labour to approach the Ministry of Health and Family Welfare to take over the ESIC Hospitals and develop them on the lines of All India Institutes of Medical Sciences (AIIMS).

126. With rising health-care costs, teachers have been expected to foot more of the bill for their health care. In order to efficiently utilize the infrastructure already created by the ESI Corporation and to ensure uniformity in standards of medical education across all Government run medical colleges, the Ministry of Health and Family Welfare may be approached to take over the colleges and medical education projects of the ESI Corporation and develop them akin to AIIMS. It cannot be a difficult task, as the ESI Corporation has both the capacity and mandate to run them.

127. Admittedly, ESI is functioning on the contributions of the insured persons or subscribers and their employers and cannot deny medical facilities to them on the pretext of shortage of staff. The ESI has to address the Ministry to provide staff in ESIC hospital and make them 100% functional. The Performance Audit Report of the ESI Corporation has revealed the following findings:

i) Outstanding due on account of contribution to be recovered from covered establishments ;

ii) Initiate timely action to determine the dues to avoid being time-barred;

iii) Have a check on the persons availing the benefits from ESI dispensaries / hospitals without paying as it is only intended for those insured only.

128. The other areas of concern are:

i. There shall be a regular monitoring process of the functioning of the ESIC.
ii. Due to non-availability of super speciality treatment in ESIC Hospitals, the subscribers have to go to empanelled hospitals for treatment adding additional expenditure to the Corporation ;
iii. Non-availability of CT Scans and MRI cannot cripple the functioning of the ESI Corporation hospitals.
iv. Shortage of Doctors also should be addressed, which can be achieved by upgrading the dispensaries to hospitals.
v. Expansion by increasing number of new dispensaries with all facilities functioning 24 X 7, in other words, round the clock.

129. Needless to state that by virtue of exercise of powers under Section 1(5) of the ESI Act, more and more educational institutions have been brought within the umbrella of the ESI Corporation to cater the needs of the subscribers. Therefore, it can no longer be stated that ESI dispensaries can be established only on the industrial belt catering the medical needs and allied services to the workers. As the nation itself is looking at 100% literacy, every town and village having sufficient number

of schools and colleges, as per the norms fixed by the ESI Corporation, should, definitely, have ESI dispensaries or hospitals with all the facilities. It is mandatory on the part of the ESI Corporation to achieve the said milestone without any delay.

130. This matter was heard and reserved for orders just before the preparations for lock down of the Country on account of COVID–19 pandemic were announced. Thus, in addition to whatever we have stated above on the merits of the issue referred to us, we are also of the view that the present economic conditions necessitate some leeway and negotiations in the matter of settlement of arrears due by the Educational Institutions.

131. Section 91 C of the ESI Act comes to aid. Section 91 C provides for the writing off of loss and states as follows:

> *"91C. Writing off of losses Subject to the conditions as may be prescribed by the Central Government, where the Corporation is of opinion that the amount of contribution, interest and damages due to the Corporation is irrecoverable, the Corporation may sanction the writing off finally of the said amount."*

132. A provision is, thus, made for the Corporation to sanction the writing off of the contribution, interest and damages due to it if the Corporation is of the opinion that such amounts are irrecoverable from

the Educational Institutions concerned. The pandemic has resulted in a situation where several Educational Institutions are reportedly unable to even pay regular salaries to their employees. The financial crunch faced by them, at this juncture, is a matter of public knowledge. The impugned Notification no doubt mandates certain contributions to be made and we have upheld the validity of the same. The contributions to be made under the Notification enure to the coffers of the Corporation and it is not the Corporation's case that there are claims that have been made by the employees of the Educational Institutions that remain unfulfilled on account of the failure of the Institutions to make the contributions in the first place. No prejudice has thus been caused to the employees per se for the periods till date on account of such failure by the Educational Institutions.

133. We, thus, strongly recommend that the provisions of Section 91C be applied in letter and spirit by the Corporation in considering the case for reduction/waiver of pending arrears, if and when made by the Educational Institutions. Such requests, if and when made, shall be considered by the Corporation in line with the object and spirit of Section 91 C, particularly in the light of the present economic conditions.

134. To sum up, we answer the questions of reference as below:

(i) The decision regarding the validity of the impugned notification issued under Section 1(5) of the ESI Act could well have been taken by the Division Bench and the postponement of the same pending decision of the reference in **Jai Bir Singh (paragraphs 38, 41, 42 and 44 in particular)** by the Larger Bench was not warranted ;

(ii) The answer to question No.(i) is in the negative and hence, question No.(ii) does not require resolution. However, we are of the view that the orders of the Division Bench dated 09.06.2015 and 16.06.2015 are only in the nature of interim orders ;

(iii) The ESI Act can very well treat the private unaided educational institutions as 'establishments' within the meaning of the said Act and the term 'otherwise' has clearly been placed to specify that genus of establishments is not restricted to those organisations, which are industrial, commercial or agricultural only, but also includes organisations like educational institutions;

(iv) There is no discrimination between the private unaided educational institutions and the public and government aided

private educational institutions, pursuant to the issuance of the notification No.II 2/LE/52/2013, dated 02.01.2013 ; and

(v) As far as question Nos.(v) and (vi) are concerned, no amendment is required to be made by the State or Central Government to implement the impugned notification.

135. In view of the above conclusion, there is no necessity to place these writ petitions before the Division Bench and accordingly, all these writ petitions are dismissed as devoid of merits. There will be no order as to costs.

136. Consequently, the contempt petition and the connected sub applications are closed.

137. As far as the Writ Appeals and Writ Petitions covered under the common orders dated 09.06.2015 and 16.06.2015, the same may be placed before this Bench for further orders, as per the order of the Hon'ble Chief Justice dated 13.03.2020.

(P.S.N., J.) (A.S.M., J.) (P.T.A., J.)

29.07.2020

Speaking / Non-speaking Order
Index : Yes/No
Internet : Yes
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To

1. The Principal Secretary,
Labour and Employment Department,
Government of Tamil Nadu,
Fort St. George,
Chennai-600 009.

2. The Regional Director,
Employees State Insurance
Regional Corporation
No.143, Sterling Road,
Nungambakkam,
Chennai-600 034.

Copy to:

The Secretary,
Ministry of Labour and Employment,
Government of India,
Shram Shakti Bhawan,
Rafi Marg,
New Delhi-110 001.

PUSHPA SATHYANARAYANA, J.
ANITA SUMANTH, J.
AND
P.T.ASHA, J.

gg

W.P.No.34236 of 2019,
1370 of 2020, 1371, 1382, 1387,
1389,1704, 2422, 2491, 2764, 3342, 3344,
3348, 3741, 3743, 3745 & 5165/2020
& Cont.P.No.1960/2019

29.07.2020